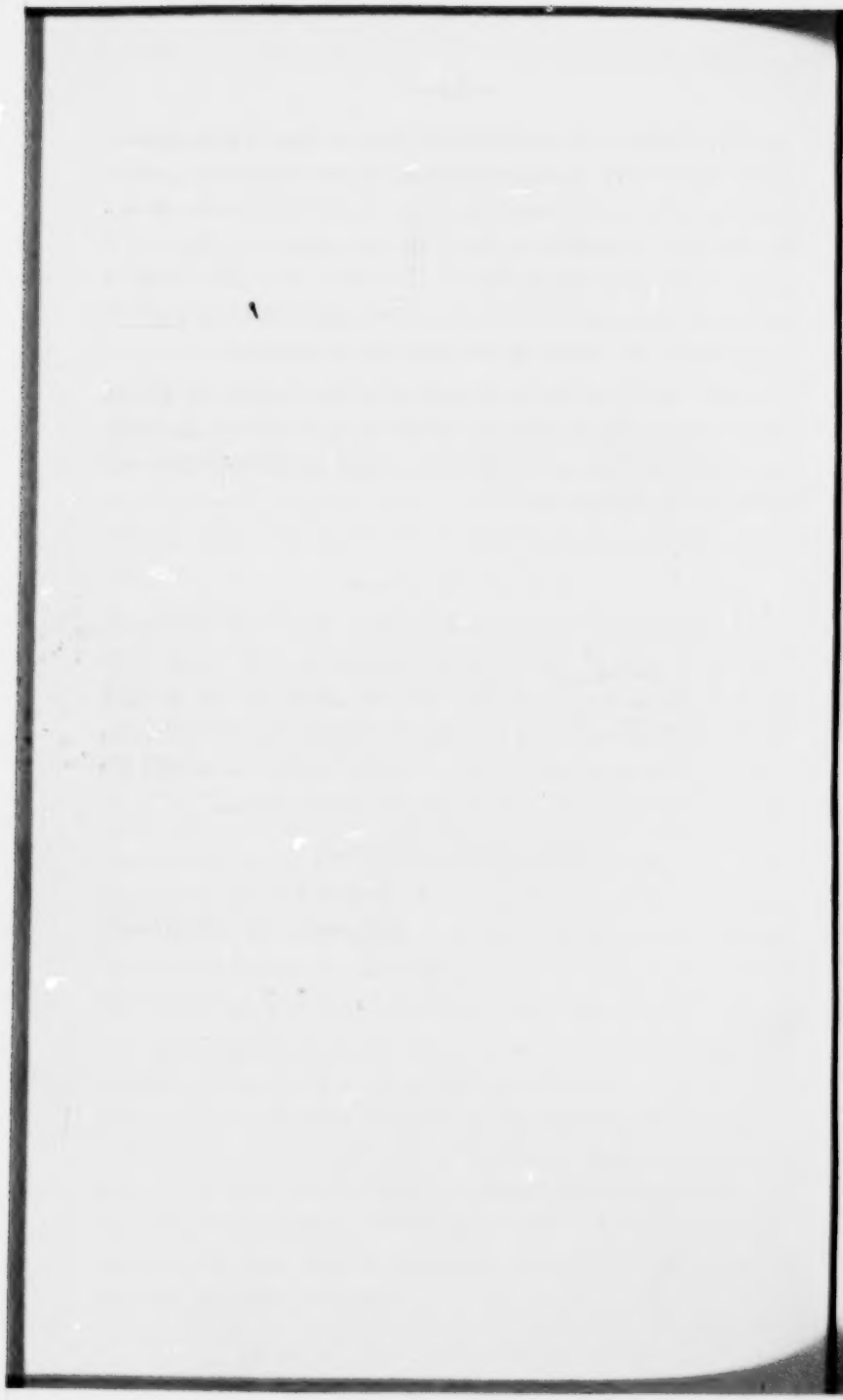

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 368 - 370

LOUIS H. ROSENBLUM,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

MAX STRYK,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

JACOB WEISS,
Petitioner, Appellant below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee below.

SEPARATE AND SEVERAL PETITION AND BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Republic Bank Building,
Dallas, Texas,
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Nos. .....

LOUIS H. ROSENBLUM,
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Petitioner, Appellant below,
vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

SEPARATE AND SEVERAL PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners, Louis H. Rosenblum, Max Stryk and Jacob Weiss, hereinafter designated as defendants, sep-

arately and severally petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review and reverse the decision of that Court of June 13, 1949 (petition for rehearing overruled August 24, 1949), affirming the judgments of the District Court of the United States for the Southern District of Indiana, convicting each defendant of a violation of Section 145(b), Internal Revenue Code, Title 26, U. S. C. A., in the case against each defendant as above entitled, and each respectfully represents as follows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. By a separate indictment against each defendant, the Grand Jury in the Southern District of Indiana, Indianapolis Division, on the 19th day of September, 1947, charged each defendant separately with attempting to defeat and evade a large part of his income and victory tax for the calendar year 1943, by filing and causing to be filed with the Collector of Internal Revenue, at Indianapolis, Indiana, a false and fraudulent income and victory tax return by understating the amount of his income as therein specifically set out. (Rosenblum, R. 3, 4; Weiss, 5, 6; Stryk, 7, 8.)

2. For example, in the indictment against Rosenblum (R. 3, 4), the Grand Jury specifically charged that his net income for said calendar year was $210,397.21,

"derived as follows:

Gross Income:		
Salary	$ 34,562.50	
Dividends	145,022.72	
Interest on Government obligations	285.86	
Capital Gain	28,715.60	
Other Income	4,109.97	
Total Income		$212,696.65",

from which certain itemized deductions were subtracted, leaving the alleged net income of $210,397.21, upon which it was charged that he owed a tax of $157,760.36.

3. The three indictments in form were identical as that set out for Rosenblum in 2 above, except for the immaterial variances as between the three defendants in the amounts of gross income and deductions. (R. 3-7.) There was no charge as to Weiss that he had received any unreported "Capital Gain" and the Government completely abandoned the charge of "Capital Gain" contained in the Rosenblum and Stryk indictments and this item is not an issue in these proceedings. (R. 53, 56, 87, 88.)

Each of the defendants, on or before March 15, 1944, had filed separate individual income tax returns (Government's Exhibits A-1, A-2 and A-3) for the year 1943. (R. 85.) The itemization in the individual tax returns was identical with the breakdown in the separate indictments, with the only material difference between the returns as filed and the three indictments being the addition in the indictments of the item of "Dividends" in the amount stated.

4. On motion, the Court ordered the United States Attorney to file a bill of particulars as to each indictment, and to show therein

(1) The name or names of the corporation or corporations from which the alleged dividends had been received?

(2) The date of the payment or the receipt of such dividends?

(3) Whether such dividends consisted of money, in kind, stock or other evidence of benefit?

(4) How is it determined that the figure or figures is or are dividends, that is, did the corporation or corporations have earnings or profits sufficient to justify the amount it paid and at the time it paid the alleged dividend or dividends?

and

> (5) As to Rosenblum and Stryk—what sale, transfer or exchange gave rise to the item of "Capital Gain" included in the alleged gross income charged in the respective indictments? (R. Rosenblum, 36, 37, 52; Weiss, 40, 41, 52; Stryk, 44, 45, 52.)

5. In response, the Government's Bills of particulars informed the defendants that *no corporate dividends* were received by any of the defendants, and that no effort to prove dividends received from a corporation would be made on the trial against any of the defendants, and that no capital gain would be shown or proven to have been received by either Rosenblum or Stryk. (Rosenblum, R. 53; Weiss, R. 54, 55; Stryk, R. 55, 56.)

In the Bills of particulars, the United States Attorney further stated that "The word 'dividends' used in the indictment is used in its broad sense of a division of money among two or more people," and that the money described as dividends in the indictment represents a division of money received by the defendant from a joint venture in which he and the other defendants had participated. (R. 53, 54, 55.) In explanation of this, the United States Attorney informed the trial court (R. 257, 258): "The Grand Jury could not have been charging them with getting dividends because people who are not stockholders can't get dividends of corporations, and the Grand Jury knows that. * * * Now, it is my contention that the Grand Jury, knowing that these men were not stockholders of the corporation (except defendant Stryk was a stockholder of one of the corporations) used the word in the common language, and I don't think there is any objection to doing that."

6. At the trial, the Government admitted that there was no falsity in the tax return of any defendant except as to the item of "Dividends" shown in each indictment in the breakdown of "Gross Income". (R. 87, 88.) It ad-

mitted that it had no evidence to prove that either Rosenblum or Stryk had received any "Capital Gain" which they did not report. (R. 87, 88.)

The Government also admitted and announced at the commencement of the trial that it did not intend to charge the defendants with the receipt of "Dividends" from any corporations which they did not report. (R. 87, 88.)

The defendants thereupon moved the trial court to find for the defendants upon such admissions. (R. 88, 89.) The court denied such request. (R. 89.)

7. At the close of the Government's evidence, and before the defendants had rested, the trial court at R. 255-259, in discussing the charge in the indictments, the receipt of "Dividends", and the nature of the proof offered by the Government as to money collected, stated at R. 259, "• • • can it be said that those moneys thus collected amounted to dividends?"

"Now, that becomes a very material question upon the substantive counts."

At R. 261, in discussing what is, and what is not a dividend as defined by the income tax statute, the trial court, in response to defendants' insistence that there was an entire failure of proof as to the receipt of "Dividends" as defined by the Internal Revenue Code, stated: "Well that is the question of the case."

At R. 262, while the separate motions for acquittal were pending, the trial court further said that he preferred not to pass upon these motions at this stage of the proceedings.

8. After the Government had abandoned the offense charged in the indictments (the receipt of dividends) the Government, over the objections of the defendants (R. 88, 89, 255, 256, 257, 258 and 259), proceeded to try the defendants for the receipt of money in a "Joint Venture." (Opin-

ion of trial judge, R. 276; Opinion of Circuit Judge Kerner, R. 392; Opinion of Chief Judge Major, R. 398.)

9. The testimony of Government witnesses, supplemented by the Exhibits received as part of their cross-examination, proved conclusively that in the joint venture defendants suffered a loss and had no net income which they failed to report (Government's Exhibits A-13, A-14 and Defendants' Exhibit 6) and that their individual tax returns as filed in March, 1944, were true and correct (R. 116, 117, 119, 120), that is to say, defendants had no more tax liability than was disclosed by their said returns.

10. The defendants had a complete defense to the charge of having received non-reported dividends. When the Government admitted that the defendants did not receive "Dividends", the defendants did not feel that they were called upon to answer a different charge and one not contained in the indictments. (R. 256, 257.) The opinions of both the trial court and the Court of Appeals show conclusively however that the defendants were found guilty of a charge other than the receipt of net income from unreported "Dividends" (R. 276, 279, 392, 398) and that the trial proceeded upon the alleged receipt of gross receipts from a joint venture. (R. 392, 398.) The trial court held (R. 280): "This was an illegal joint enterprise" and that the theory of trial and the nature and relevancy of the proof mattered not, stating at R. 278, 279:

> "* * * it is impossible to see how they (defendants) could be prejudiced by the government's labeling the income as 'dividends' or 'profits from a joint venture' instead of merely labeling it as 'other income.' Furthermore, I am of the opinion that profits from a joint venture are not inaptly called dividends. The phrase is fully descriptive also of corporate profits divided by the people who in fact own and control the corporation. Any possible prejudice to the defendants is seen to be even more remote if we consider the

fact that defendants' principal defense is that the money received was merely gross income from which they should be allowed to deduct expenses which exceeded the income. If defendants were relying on the government's original theory of joint venture, as they now claim they were, why did not they attempt to rebut the government's case by introducing evidence of the expenses which they assert were incurred in the sale of the whiskey? Such evidence would have been admissible under the joint venture theory, but not under the dividend theory."

11. Despite the structure of the three indictments and the declarations of the United States Attorney that he did not intend to prove the receipt of dividends by the defendants, the Government was permitted over the objections and protests of defendants to go into two whiskey transactions. With one of these, referred to at the trial as the "Beam" transaction, the defendant Weiss had no connection. (R. 393.) Weiss, however, was found guilty of and stands convicted of the receipt of income from this source. (R. 277, 280, 281, 392, 398.) At the trial it was stipulated by the government and the defendants that the money which was not accounted for in the tax returns "were gross amounts received in cash by Louis H. Rosenblum in the transaction from purchasers" of whiskey. (Government's Exhibit Z.)

12. Without going into the details of the whiskey transactions in this Petition, it suffices to point out that the sums received by defendant Rosenblum in the whiskey transactions were *gross income* against which, as provided in Sections 21, 22 and 23 of the Internal Revenue Code, the defendants were entitled to various set-offs and deductions. The whiskey cost the defendants $466,039.32. (Defendants' Exhibit 6.) In computing the alleged tax, the government allowed the defendants no cost for the whiskey. (R. 234.) Expenses were paid out in making the sales

in the sum of $145,506.07 as shown in Government's Exhibits A-13 and A-14 introduced by Government's witness Richardson (R. 121, 122); the Government allowed $8,746.70 of such expenses and disregarded $136,759.37 thereof. (R. 234.) The cost of the whiskey amounting to $466,039.32 and expenses of $145,506.07 totalled $611,545.39 and exceeded the gross receipts and there was no net income from the whiskey transactions.

In the hypothetical question and answers of the Government's tax expert, witness Ruggaber, it was made to appear as though the Government was allowing $25,698.99 of defendants' expenses (R. 234-238), whereas on cross-examination the witness submitted Government's Exhibits Y-1 and Y-2 on which were detailed the items aggregating the gross figures assumed and wherefrom, upon interrogation, it was developed unequivocally (R. 240, 241, 245, 246, and 247), that of the said $25,698.99 only $8,746.70 was allowed as defendants' expenses and that the difference of $16,952.29 was an over-statement of that amount in the $586,178.97 assumed as the gross income of the defendants in the hypothetical question and answer. The questions and answers were objected to by defendants as being incomplete, inaccurate, and failing to assume the Record facts of the defendants' whiskey costs and all of their expenses and that it was incompetent and irrelevant to the indictment charge of "Dividends", and for the further reason that as to defendant Weiss, it assumed and sought to charge him with moneys collected on the "Beam" transactions with which he had no interest or relation.

The finding of guilt overlooks the fact that the only proof in the Record is as to gross receipts. The court disregarded the deductions and refused to give effect to Government's Exhibits A-13 and A-14, the expenses of the defendants in the joint venture, when the Government offered no proof to the contrary and nothing to question the

verity of that which such Exhibits (A-13 and A-14) proved. But if this evidence of cost and expenses is not further substantiated in the Record, the fault lies entirely with the Government. The defendants were not called upon to meet this kind of a charge—and they should not have been penalized, as they were, *after* the trial (R. 279), for failure to go forward with proof which was available and which they were prepared to introduce if they had not been misled by the trial court and the proceedings at the trial. They asserted, and still assert, that upon the trial they were only called upon to defend the offense as set forth specifically in the indictment and could not be compelled to meet a different charge. Since the charge in the indictment was not proved and the Government by its own witnesses and evidence had shown that defendants had no *net* income upon which they failed to pay a tax, the defendants were entitled to rest without introducing further evidence.

13. The trial court encouraged the defendants in their position by holding throughout the trial that there was no issue of fact because there was no evidence to show that defendants received "Dividends"; the Government admitted that the only issue was whether or not the money received by the defendants from a joint venture in whiskey could, as a matter of law, be said to be "Dividends" within Section 115(a) of the Internal Revenue Code; the issue was one of law as to the meaning of the word "Dividends" —and this issue, the court said he would not decide until *after* the evidence was in. (R. 88, 260, 261.) Having decided *after the trial was over* that dividends meant something different from the Congressional definition, due process was denied to defendants and each stands convicted of a charge not laid in the indictments.

The position of the trial court, stated early in the trial, is shown by the following statement:

> "The Court: Of course your objection, Mr. Ward, raises a legal question, and a question which I shall

determine upon all of the evidence. I am not going to pass at this stage of the case, upon this question of what constitutes dividends and what does not constitute dividends under a proper construction of the acts of Congress. That question I shall reserve until the conclusion of the evidence. I see that you are going to have controversy all through this lawsuit about whether anything in the indictment can be reached under the designation of dividends." (R. 89.)

There was no evidence that any corporation had any earnings or profits out of which dividends could have been paid.

14. Concurrent with the return of the foregoing individual substantive indictments against defendants, the Grand Jury returned an indictment charging defendants (R. 8) with having conspired to attempt to evade and defeat income and victory taxes due for the calendar year 1943, by filing and causing to be filed with the Collector at Indianapolis, Indiana, false and fraudulent returns. The conspiracy indictment, over the objections of the defendants (R. 63), was consolidated for trial, upon motion of the District Attorney, with the foregoing individual substantive indictments.

The Court of Appeals reversed all three convictions on the conspiracy indictment. (R. 400, 401, 402.)

The record shows that evidence which was erroneously received on the basis of the conspiracy charge, and which caused the reversal thereof (R. 398 to 402), was erroneously considered and relied upon by both courts below to convict the defendants on the substantive indictments.

The statements by one or another of the defendants, made long after the commission of all acts charged in the indictments or relied upon by the Government as constituting the offenses charged had been completed, were erroneously relied upon and held by both courts below to be

binding upon the other defendants over the separate objections of the several defendants that such statements were hearsay as against the defendant not making them. (R. 88, 89, 95, 145, 151, 162, 170, 193, 214, 223, 225, 229 and 230.)

The vice of this procedure is aggravated by the fact that the trial court failed to differentiate between the proof relevant to the substantive offense and that relevant to the conspiracy charge (R. 399), and the trial court was powerless to prevent the abuse which resulted from getting evidence into the record which was wholly inadmissible on any theory, but which he admitted solely upon the conspiracy charge. (R. 95, 225 and 401.) Such procedure was an abuse of judicial process (R. 400) and destroyed a fair administration of justice to these defendants. (R. 401.)

15. The statement of defendant Rosenblum of March 21, 1944 (Government's Exhibit X-1) relating to "Beam" transactions with which defendant Weiss (R. 393) had no connection—and no interest—was received in evidence against all the defendants (R. 244) notwithstanding the same was made in the absence of both defendants Weiss and Stryk.

The evidence of Siemion (R. 146-150), Ackerman (R. 151), Hicks (R. 155), and Palffy (R. 159), as to records of Gary Wine & Liquor Corporation, and conversations and transactions had by such witnesses with Rosenblum concerning the sale of "Beam" whiskey, all in the absence of Weiss, were admitted over the objection of Weiss that he had no connection with the "Beam" whiskey sales and all of such evidence was hearsay as to him. (R. 95, 145, 151.)

The statements U-1, U-2, U-3, V-1, V-2, V-3, V-4, V-5, A-8, A-9, A-10 and A-11, allegedly made by the different defendants at different times in 1945 and 1946, in connection with settlement negotiations with the Government agents were erroneously received in evidence and relied

upon to convict the defendants. (R. 114, 115, 116, 117, 118, 119, 120, 221, 223, 224, 225, 229, 231, 232, 233, 279, 281, 395 and 396.)

16. The indictments which charged the substantive offense against each defendant did not allege that the defendants had participated in the same act or transaction or in the same series of acts or transactions constituting the separate offenses charged. (R. Rosenblum, 3, 4; Weiss, 5, 6; Stryk, 7, 8.)

17. Trial by jury was waived (R. 72), and trial before Judge Lindley, resulted in conviction of each defendant as to the substantive offense against him and as to the conspiracy charge, and each defendant was sentenced to imprisonment of three years on the substantive offense and fined $10,000.00, and each was given a cumulative sentence of two years and fined $10,000.00 on the conspiracy charge, and assessed with one-third of the costs. (R. Rosenblum 295, 296, 298; Weiss, 296, 298; Stryk, 297, 299.)

18. Each defendant filed a motion for acquittal at the close of the Government's evidence, for the reason that the evidence was insufficient to sustain a conviction against him of the offense charged in the indictment. (R. Rosenblum, 269, 271; Weiss, 270, 271; Stryk, 270, 271.) Such motions were overruled. (R. 271, 272, 273.) A similar motion was filed by each defendant at the close of all the evidence. (R. Rosenblum, 272, 274; Weiss, 272, 274; Stryk, 273, 274.) These were all overruled. (R. 283, 284.) Each defendant filed a motion in arrest of judgment, which was overruled. (R. Rosenblum, 287, 288, 291, 292, 295; Weiss, 289, 294, 296, 298; Stryk, 290, 293, 294, 297.) Each defendant, within five days after judgment, filed a renewed motion for acquittal, which was overruled. (R. Rosenblum, 284, 285, 287, 288, 291; Weiss, 285, 287, 290, 291; Stryk, 286, 287, 291.)

19. Each defendant took a separate appeal from his

judgment of conviction to the Court of Appeals for the Seventh Circuit; notice of such appeal, statement of points, and supersedeas bond having been made and filed on August 23, 1948. (R. Rosenblum, 300 to 309, bond, 357-358; Weiss, 309 to 318, bond, 359-360; Stryk, 319 to 328, bond, 362-363.)

20. By written stipulation, approved by the Court of Appeals, all of the cases were presented upon the one printed Record and the printing of the exhibits dispensed with. (R. 380, 381.) The defendants herein have accordingly caused this petition to be accompanied by one certified transcript of Record in the cases, including the proceedings in said Court of Appeals.

21. In the Court of Appeals for the Seventh Circuit the cases were heard by Chief Judge J. Earl Major and Circuit Judges Otto Kerner and F. Ryan Duffy; each judge wrote a separate opinion, a copy of which, for convenience, is set out in the Appendix to the brief filed in support of this petition as Exhibit "A".

II.

BASIS OF THIS COURT'S JURISDICTION.

The judgment of the Court of Appeals affirming the judgment of conviction of each defendant was rendered on June 13, 1949. (R. 403, 404, 405.) Each defendant filed a petition for rehearing in said Court on June 23, 1949. (R. 405.) Each petition for rehearing was denied by the Court of Appeals on August 24, 1949. (R. 406.)

On September 20, 1949, Mr. Chief Justice Fred M. Vinson, for cause shown, upon the application of counsel for defendants, ordered that the time for filing petition for certiorari in these causes be extended to and including October 7, 1949.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code, Judiciary and Judicial Procedure, Effective September 1, 1948.

This petition is presented by the separate and several petitioners who were defendants in, and parties to, the said criminal causes as hereinbefore set out.

III.

QUESTIONS PRESENTED.

One.

Serious error was committed in convicting the defendants of a charge not contained in the indictments. Failure to give an accused notice of the precise offense to be met—the heart of due process—cannot be argued away as mere differences in verbiage. The trial court thought likewise during the trial—and the seriousness of the error is pointed up by him in the following sentence from his decision—"Such evidence would have been admissible under the joint venture theory, but not under the dividend theory." (R. 279.) This is precisely what the defendants believed—and they made timely objections to the introduction of evidence at variance with the indictment—and refused to be drawn into a trial of a different offense.

Two.

There was an utter failure of proof of corpus delecti. The conviction of each of the defendants of the charge made against him was serious error. No competent evidence was introduced showing that any of the defendants had a net income for 1943 upon which he did not pay the proper tax. The defendants suffered a loss in their 1943 whiskey transactions. The Court of Appeals erred in not ordering the discharge of each defendant upon his several motions for acquittal.

Three.

It was prejudicial to the substantial rights of defendant Weiss to receive and consider the testimony of Witnesses Ackerman, Hicks, Palffy and Siemion, and substantial and prejudicial error was committed against all of the defendants by the trial court in admitting in evidence and in considering the statements, and the amended returns of the several defendants, made in the absence of one or the other, all of which were made long after the commission of all acts which the Government claimed constituted guilt of the several crimes charged.

The reversal by the Court of Appeals of the convictions on the conspiracy indictment automatically rules out the mass of evidence admitted into the Record solely because of the claim of conspiracy. Absent such testimony no evidence is left to support the convictions.

Four.

The Court of Appeals erred in not reversing the several judgments of conviction because of the prejudice to the fundamental rights of each defendant which flowed from the erroneous consolidation of all four indictments for trial.

The illegal consolidation of the four indictments for trial was a prejudicial abuse of judicial discretion.

The trial court failed to differentiate as to the proof relative to the several crimes charged. (R. 399.) He was powerless to prevent the abuse of getting evidence into the Record which would have been inadmissible, except for such consolidation. (R. 401.)

The defendants were denied a just and fair trial.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Question One.

The Government admitted the truthfulness of the individual tax returns filed by each defendant separately in March 1944, covering the year 1943, except it disputed the omission from such returns of the item descriptively charged in the separate indictments as "Dividends"; and the Government further admitted that as to the item specifically charged as "Dividends" it had no evidence, and would offer no evidence, to show that any of the defendants had received any "Dividends" from any corporation. (R. 53-56, 87, 88, 258.)

A.

It was therefore a denial of due process to try, and to convict, the defendants of having had gross receipts from dealings in buying and selling whiskey, upon indictments which specifically charged that they had received "Dividends" which were wrongfully omitted from their returns.

In affirming the convictions, the Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court in *Cole* v. *Arkansas*, 333 U. S. 196; *DeJonge* v. *State of Oregon*, 299 U. S. 353; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Britton*, 107 U. S. 655; *Spies* v. *United States*, 317 U. S. 492, 499.

Such decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter in *Singer* v. *United States*, Third Circuit, 58 F. 2d 74, 75; *Kutler* v. *United States*, Third Circuit, 79 F. 2d 440, 442; *Haitman* v. *United States*, Ninth Circuit, 5 F. 2d 887; it is

in conflict with its own decision in *United States* v. *Tuffanelli*, 131 F. 2d 890, 892. (7 C. A.)

The trial court should have discharged the defendants when the District Attorney announced in open court that he had no evidence to convict the defendants of having received corporate dividends as charged in the indictments. The failure of the Court of Appeals to order the discharge of the defendants is a decision of a federal question in conflict with the applicable decision of this Court in *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261, and Rules 23(c) and 29(a) of the Federal Rules of Criminal Procedure; Section 115(a) Internal Revenue Code.

By such decision, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

B.

The defendants were deceived and misled by the bills of particulars and the holding of the Court throughout the trial that the issue was one of law as to the meaning of the word "Dividends" as defined by Congress in Section 115(a) Internal Revenue Code, which he would not decide until after the evidence was in. (R. 88.) They gave up their right to a trial by jury when the District Attorney alleged in his bills of particulars that there was no evidence to show that any of the defendants had omitted dividends from his return; the decision of the Trial Court at R. 259, that the "dividend" charge in each indictment "became a very material question upon the substantive counts" prejudicially deceived them as to whether any evidence should be introduced. Under the unusual circumstances in these cases, the specific charge in the indictments, the bills of particulars, the statements of the United States Attorney,

and the rulings of the Court during the trial, the conviction of the defendants upon the joint venture theory was a violation of the rights guaranteed them by the Fifth and Sixth Amendments to the United States Constitution.

In deciding otherwise, the Court of Appeals has misconstrued and misapplied Rule 7(c) and Rule 52(a) of the Federal Rules of Criminal Procedure, and such decision presents an important question in the administration of the criminal law. None but a Grand Jury can bring in an indictment—and it does not lie within the power of a court or District Attorney to change it. The lower courts have sought to escape this rule of fundamental law by treating the variance from the indictment as a mere matter of labelling. In fact the variance is one of substance under the Internal Revenue Code. If a dividend is received the taxpayer is allowed no offsetting deductions, but if money is received in a commercial transaction, the statute allows deductions of costs and expenses before taxable income can be said to arise, Sections 21, 22, 23, 51(a) Internal Revenue Code.

Such decision of the Court of Appeals is a decision upon a federal question in conflict with the decision of this Court in *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, and *United States* v. *Murdock,* 290 U. S. 389.

C.

It was prejudicial error to consider the indictments in the sense that they had been altered or amended by the deletion or omission therefrom of the specific words and figures "Dividends, $145,022.72", as to Rosenblum, and the similar words and figures as to Weiss and Stryk, and the convictions will not protect each defendant against another prosecution for the same offense.

In deciding otherwise, the Court of Appeals has decided a federal question in a way probably in conflict with the

applicable decisions of this Court in *Ex Parte Bain,* 121 U. S. 1; *United States* v. *Norris,* 281 U. S. 619; *Morgan* v. *Devine,* 237 U. S. 632.

Such decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter in *Edgerton* v. *United States,* Ninth Circuit, 143 F. 2d 697; *Dodge* v. *United States,* Second Circuit, 258 Fed. 300, 305 (certiorari denied, 250 U. S. 660); *Stewart* v. *United States,* Ninth Circuit, 12 F. 2d 524; see also its own decision in *United States* v. *Denny,* 165 F. 2d 668, 671, with a separate opinion by each, Circuit Judge Kerner, District Judge Lindley and Circuit Judge Minton.

Reasons as to Question Two.

A.

No reason nor explanation is in the Record why defendants' cost and all of the expenses were not properly deductible from the gross receipts. The Court of Appeals erred in deciding that defendants should stand convicted of attempting to evade the payment of income taxes on moneys derived from dealings or transactions involving the purchase and sale of intoxicating liquors, when there was no evidence to show that defendants realized a gain from those transactions. Defendants should have been allowed the cost of the liquor, and the expenses of selling the same; no cost was allowed and only a small part of the expenses of sale were deducted from the gross receipts by the Government.

The decision of the Court of Appeals in not allowing such cost, and the full amount of expenses, is a decision of a federal question in a way in conflict with the applicable decisions of this Court in *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *United States* v. *Murdock,* 290 U. S. 389; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Eisner* v. *Macomber,* 252 U. S. 189; *Spies* v. *United States,* 317 U. S. 492.

Such decision of the Court of Appeals is in conflict with decisions of Courts of Appeals of other Circuits in *Gleckman* v. *United States,* 80 F. 2d 394, Eighth Circuit, certiorari denied, 297 U. S. 709; *United States* v. *Schenck,* 126 F. 2d 702, Second Circuit; *Nicola* v. *United States,* 72 F. 2d 780, Third Circuit; *Kirsch* v. *United States,* 174 F. 2d 595, Eighth Circuit.

Said decision of the Court of Appeals for the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

B.

The only competent proof in the Record was that defendants received gross income in their whiskey dealings in 1943 which they did not report in their returns. If this was wrong and the same amounted to a crime, it was a misdemeanor and a violation of Section 145(a) of the Internal Revenue Code, Title 26, United States Code, and was not the felony of which defendants each stand convicted under Section 145(b) of said Internal Revenue Code.

It was error of the Court of Appeals to fail to order the discharge of each of the defendants and its decision is a decision of a federal question in conflict with the decision of this Court in *Spies* v. *United States,* 317 U. S. 492.

Reasons as to Question Three.

A.

The Court of Appeals erred in deciding that statements and amended returns of the several defendants, being statements made in the absence of the others, could be received and considered in evidence as admissions against all of the defendants.

The admissions, declarations and acts of those severally charged with the commission of a crime, but jointly tried, made before or after such crime has been committed in the absence of the others, cannot be used against anyone but the declarant and cannot be used against him, unless there is other substantial extrinsic evidence which proves corpus delecti, and there is no such extrinsic, independent proof in this Record.

B.

The admission of the evidence of Ackerman, Hicks, Palffy and Siemion against defendant Weiss was exceptionally prejudicial, as it related solely to transactions concerning sales of the "Beam" whiskey by Rosenblum, at least three months before Weiss had any connection with any of the whiskey transactions; the doctrine of relation back to establish a crime, or to connect one with a crime, is unknown to our criminal law, and such evidence and his conviction thereon was very prejudicial as to Weiss.

Such decision of the Court of Appeals is a decision by it upon a federal question in a way in conflict with applicable decisions of this Court in *Krulevitch* v. *United States,* 336 U. S. 440, 445-446; *Fiswick* v. *United States,* 329 U. S. 211, 215, 217; *Kotteakos* v. *United States,* 328 U. S. 750; *Brown* v. *United States,* 150 U. S. 93, 98; *Logan* v. *United States,* 144 U. S. 263, 309.

The decision of the Court of Appeals upon these questions is in conflict with former decisions of the Seventh Circuit in *Fox* v. *United States,* 45 F. 2d 364; *Roma* v. *United States,* 53 F. 2d 1007; and *Collenger* v. *United States,* 50 F. 2d 345, 348; such decision is in conflict with the decisions of other Courts of Appeals on the same matter in *Lane* v. *United States,* 34 F. 2d 413 (8 C. A.); *Gulotta* v. *United States,* 113 F. 2d 683 (8 C. A.); *Forte* v. *United States,* 94 F. 2d 236 (C. A. D. C.); *Daeche* v. *United States,*

250 Fed. 566 (2 C. A.); *Jordan* v. *United States*, 60 F. 2d 4 (4 C. A.); *Martin* v. *United States*, 264 Fed. 950 (8 C. A.); *Tingle* v. *United States*, 38 F. 2d 573 (8 C. A.); *Naftzger* v. *United States*, 200 Fed. 494 (8 C. A.); *Goff* v. *United States*, 257 Fed. 294 (8 C. A.); *Duncan* v. *United States*, 68 F. 2d 136 (9 C. A.); *Gordnier* v. *United States*, 261 Fed. 910 (9 C. A.); *McWhorter* v. *United States*, 281 Fed. 119, 121 (6 C. A.); *Beck* v. *United States*, 33 F. 2d 107, 112 (8 C. A.).

The decision of the Court of Appeals on these questions has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

Reasons as to Question Four.

A.

The consolidation of the four indictments for trial was illegal and a prejudicial abuse of judicial discretion because there is no allegation in either of the substantive indictments that the defendants had participated in the same act or transaction or in the same series of acts or transactions constituting the offenses charged. Rules 8 and 13, Federal Rules of Criminal Procedure, make the allegations in the indictments the test by which consolidation shall be determined.

B.

Such consolidation became extremely prejudicial to the defendants because of the abandonment by the Government of the "dividend" theory charged in the indictment, and its adoption of the "joint venture" theory set out in the bills of particular; the issue became confused; the proof relative to the separate charges of each defendant became hopelessly intermingled and the trial court was unable to

differentiate between the proof relative to the several charges, and he did not prevent the abuse which flowed from getting evidence into the Record which would have been inadmissible except for such unlawful consolidation (R. 399, 401) and was confused into relying upon such evidence as proof of the guilt of all of the defendants as to all of the alleged offenses.

The Court of Appeals should have reversed the convictions, and its decision, as to paragraph A, is a decision of a Federal question in a way in conflict with the applicable decision of this Court in *McElroy* v. *United States,* 164 U. S. 76.

Its decision is in conflict with decisions of other Courts of Appeals on the same matter in *Castellini* v. *United States,* 64 F. 2d 636, Sixth Circuit, and *DeLuca* v. *United States,* 299 Fed. 741, 744, Second Circuit.

As to paragraph B, the decision of the Court of Appeals is a decision of a federal question in a way in conflict with *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211 and *Krulevitch* v. *United States,* 336 U. S. 440, 445, 446.

It is in conflict with the decision of the Court of Appeals for the District of Columbia in *McMullen* v. *United States,* 96 F. 2d 574.

The decision of the Seventh Circuit is in violation of Rule 8(b) of the Federal Rules of Criminal Procedure, and such decision presents an important question in the administration of the federal criminal law.

WHEREFORE, your petitioners separately and severally pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the Record and all proceedings of said Court of Appeals had in these

causes, to the end that these causes may be separately and severally reviewed and determined by this Court; that the several Judgments of the Court of Appeals against each defendant be reversed; and that each petitioner may be granted such other and further relief as may seem proper.

Dated: Indianapolis, Indiana, October 6, 1949.

LOUIS H. ROSENBLUM,
MAX STRYK,
JACOB WEISS,
Petitioners.

By: ALBERT WARD,
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Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. .....

LOUIS H. ROSENBLUM,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

MAX STRYK,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

JACOB WEISS,
Petitioner, Appellant below,

vs.

UNITED STATES OF AMERICA,
Respondent, Appellee below.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The Opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported, but a copy thereof is in the printed record, Opinion by Circuit

Judge Kerner being on pages 386 to 398; Chief Judge Major, pages 398 to 400, and Circuit Judge Duffy, pages 400 to 402; for convenience, a copy of the Opinion of each Judge is set out in full in the Appendix hereto as Exhibit "A".

The Opinion of the District Judge has not been officially reported, but a copy thereof is in the printed Record on pages 275 to 282.

Jurisdiction.

The Judgment against each defendant by the Court of Appeals now sought to be reviewed was entered on June 13, 1949. (R. 403, 404, 405.) Each defendant filed a petition for rehearing in the Court of Appeals on June 23, 1949 (R. 405), which were all denied on August 24, 1949. (R. 406.) Issuance of the Mandate of the Court of Appeals was stayed by it on August 26, and September 23, 1949.

On September 20, 1949, Mr. Chief Justice Fred M. Vinson, for cause shown, upon the application of counsel for defendants, ordered that the time for filing Petition for Certiorari in these causes be extended to and including October 7, 1949.

The Jurisdiction of the Supreme Court is invoked under Section 1254(1), Title 28, United States Code, Judiciary and Judicial Procedure, effective September 1, 1948.

The foregoing Petition is presented by the separate and several petitioners who were the defendants in and parties to said Criminal Causes as in said Petition set out.

Statutes Involved.

The following sections of the Internal Revenue Code, Title 26, United States Code, as the same were in effect at the applicable period, are involved in these proceedings: Section 21(a), Section 22(a), Section 22(e), Section 22(f), Section 22(n), Section 23(a), Section 23(b), Section 23(e), Section 23(i), Section 41, Section 48(a), Section 51(a), Section 53(a), Section 115(a), Section 117, Section 145(a), Section 145(b).

Federal Rules of Criminal Procedure for District Courts Involved.

The Federal Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, which are involved in defendants' Petition are as follows: Rule 7(c), Rule 8(a), Rule 8(b), Rule 13, Rule 23(c), Rule 29(a), Rule 52(a), Rule 52(b).

Statement of the Case.

A statement of the case is included in the preceding Petition under Title I thereof, "Summary Statement of the Matter Involved."

Specification of Errors Intended to be Urged.

It is intended to urge as errors each specification in the foregoing Petition under Titles III and IV thereof, entitled "Questions Presented" and in the "Reasons Relied on for the Allowance of the Writ."

SUMMARY OF ARGUMENT.

One.

Each indictment charged that each defendant had omitted "Dividends" from his 1943 income tax return; no other item was in dispute; the Government admitted that it had no evidence to prove that any defendant had received any corporate dividends which he had failed to report; the defendants requested the Court to find that the Government had no evidence to prove the charge as laid in the indictments, which the Court refused to do, but permitted the District Attorney to introduce evidence concerning whiskey transactions in which the Government claimed the defendants had engaged as participants in a joint venture.

Such charge was not made in either indictment, and each defendant was denied due process in that he was wrongfully tried upon and convicted of an offense not charged against him.

Two.

The Government failed to show that any of the defendants had any net income for 1943 upon which he did not pay his tax, and there was a failure of proof of *corpus delecti;* the defendants sustained a loss in the 1943 whiskey transactions; the trial court erroneously placed the burden upon the defendants of proving their innocence.

In contravention of the Sixteenth Amendment the Court allowed neither cost nor expenses of the whiskey bought and sold.

Three.

The receipt in evidence of the hearsay statements of the several defendants, and their amended tax returns, all made long after the commission of all acts claimed by the

Government to constitute the offenses charged, was prejudicial to the individual rights of each defendant in the substantive charges. The reversal by the Court of Appeals on the conspiracy indictments automatically rules out this mass of incompetent evidence which was admitted into the record solely because of the claim of conspiracy in the consolidated trial, and such evidence was not admissible on any theory as to either the substantive or the conspiracy charges.

The admission of the evidence of witnesses Ackerman, Hicks, Palffy and Siemion was clearly hearsay as to Weiss, and very prejudicial as to him.

The admission of Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, was prejudicial as to Weiss and Stryk, and it was hearsay as to them.

Four.

The cases below were illegally consolidated for trial in violation of Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Two judges of the Court of Appeals decided that the substantial rights of the defendants were prejudiced by the procedure in the trial court and reversed the convictions on the conspiracy indictment because the trial court could not differentiate between the proof relative to the various charges against the several defendants (R. 399); he could not prevent the prejudice resulting to the substantial rights of the several defendants which flowed from the erroneous consolidation of the causes, and the admission of incompetent testimony (R. 401); such prejudicial error cannot be confined to the conspiracy charge; it likewise prejudicially affected the substantial rights of the several defendants as to the substantive charges, and these causes should be reviewed.

ARGUMENT.

Question One.

The defendants respectfully contend that it was a denial of due process to convict them of having received gross amounts in cash from buying and selling whiskey that were not accounted for in their tax returns, upon the separate indictments which definitely charged that they had received "Dividends" in a specific amount which were omitted from their individual tax returns. Such procedure of the Government was an abandonment of the charge laid in the indictment, and an entire failure of proof, and if the matter is treated or regarded merely as a variance, it was of such a substantive character as to mislead the defendants in the preparation and presentation of their defense, and such conviction would not protect them against another prosecution for the same offense.

The trial court and the Court of Appeals have misconstrued and misapplied Rule 7(c) of the Federal Rules of Criminal Procedure, which requires that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

Under this Rule, an indictment cannot be used as a trap to ensnare a defendant, and then, after his trial is over, convict him on a charge or theory not properly or plainly outlined in such indictment.

Section 115(a) of the Internal Revenue Code, Title 26 United States Code, defines the word "Dividends" as a distribution by a corporation out of earnings or profits; the term "capital gain" is also defined by Section 117 of the Internal Revenue Code; both of these terms were used

by the Grand Jury in the indictments charging Rosenblum and Stryk with a violation of Section 145(b), and the word "Dividend" was used in the indictment against Weiss.

The charge was that the defendants had received "Dividends" which they failed to report; this could not mean anything except corporate dividends as defined by Section 115(a) of the Internal Revenue Code; this is a proper charge, as dividends are taxable to the person who receives them; but if, as the trial court said, they organized corporations and diverted from the corporation part of the moneys received for the liquors, such money belonged to the corporation and was not defendants' money. Embezzled moneys are not income to the embezzler. *Commissioner* v. *Wilcox,* 327 U. S. 404.

If the moneys belonged to corporations, before these could be said to be dividends from such corporations, it was incumbent upon the Government to prove that such corporations had sufficient "earnings or profits" remaining after the proper deductions, and the provision for all taxes to be paid by the corporation. Section 115(a) Internal Revenue Code. No such proof was made.

The Government admitted that the returns as filed by the defendants correctly listed all items of income except the item alleged in the indictments as "Dividends", and admitted it had no evidence to prove that any of the defendants had received corporate dividends which he failed to report.

Furthermore, the Government stipulated with the defendants that the moneys which it claimed they had omitted from their several income tax returns for 1943, "were the gross amounts received in cash by Louis H. Rosenblum in the transactions from purchasers" of liquor (Government's Exhibit Z); by such admission it is estopped from now asserting that the evidence supported the theory of

the prosecution as laid in the indictments; such admission is an abandonment of the issue tendered by the indictments.

Throughout the trial defendants objected to proof offered by the District Attorney to show receipt of moneys from a joint venture.

When the Government rested, defendants filed their motions for judgments of acquittal on each of the substantive indictments (R. 252) and when they pressed their motions that the Government had failed to prove the charges laid in the substantive indictments, that there was a total failure of proof of the charges made, and there was no evidence to sustain the charge of omitting "Dividends", the court said:

> "Now, that becomes a very material question upon the substantive counts." (R. 259.)
>
> * * * * *
>
> "I prefer not to pass upon this motion as to the substantive counts at this stage of the proceedings. * * *" (R. 262.)

The court did not decide the question thus presented by the defendants until *after* the trial. (R. 283.)

The failure of Congress to define the manner by which the evasion might be accomplished, placed the duty and the burden on the Government of having an indictment returned which definitely contained all of the elements necessary to constitute the offense intended to be punished; *Spies* v. *United States,* 317 U. S. 492, 499; *United States* v. *Carll,* 105 U. S. 611; *United States* v. *Cruikshank,* 92 U. S. 542; *United States* v. *Hess,* 124 U. S. 483; such essential averments must be proved before a conviction can be had.

No authority exists for a change of the charge as laid against defendants in the indictments, except it be done by

the Grand Jury; courts are powerless, under our system of justice, to allow or permit a defendant to stand convicted upon a charge not laid in the indictment, but contained in averments of a bill of particulars. *Ex Parte Bain,* 121 U. S. 1; *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Cole* v. *State of Arkansas,* 333 U. S. 196; *United States* v. *Cruikshank,* 92 U. S. 542.

The decision in *Ex Parte Bain,* 121 U. S. 1, 13, forbids the conviction of the defendants upon a charge not laid in the indictment, and forbids any change where the change is one of substance, and such change cannot be made even with the consent of the defendants, *United States* v. *Norris,* 281 U. S. 619. Nor is it necessary that the indictment itself be changed by physically striking therefrom the word "Dividends"; it is prejudicial error to consider the indictments *in the sense* that they have been altered by the omission of the term "Dividends" therefrom: *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Dodge* v. *United States,* 258 F. 300, 305 (2 C. A.).

The Court of Appeals erred in deciding that each defendant would be protected against another prosecution for the same offense; the test of identity of offenses is whether the same evidence is required to sustain them; evidence to sustain the conviction in these income tax cases on the theory that defendants had omitted dividends from their tax returns would not sustain the changed theory of the Government that they had received either gross or net income from a joint venture which they did not report. *Morgan* v. *Devine,* 237 U. S. 632.

The Court of Appeals was in error in deciding that "It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute"; *this does not decide the question we present; we admit the indictments are sufficient;* defendants claim they

were deceived by the use of the statutory words in the indictments, the statements of the trial court that such words were material, the admission by the Government that it had no evidence to prove the crime charged, and the later conviction upon an issue not presented by the indictments; these questions were not decided by the Court of Appeals; the cases of *Capone* v. *United States,* 56 F. 2d 927; *Rose* v. *United States,* 128 F. 2d 622; or *Cave* v. *United States,* 159 F. 2d 464, cited by the Court of Appeals in support of decision (R. 388), are not decisive of the questions raised by the defendants herein; neither of such cases contains the element of *abandonment* of the charge made in the indictment, nor the element of *change of theories* by the Government and the trial court, nor the element of *deception* resulting therefrom which caused defendants to waive their right to a jury trial, and deceived them as to the introduction of evidence.

These are elements of the offense as charged which affected the substantial rights of the defendants; they go directly to questions which are highly important in the administration of the federal criminal laws; they involve a construction by this Court of its Rules 7(c) and 52(a), Federal Rules of Criminal Procedure and the procedure below prejudicially affected the substantive rights of the defendants and it cannot be justified under Rule 52(a) as being harmless and immaterial; *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211-218.

Question Two.

Notwithstanding the definite charge in the indictments, the Government undertook the prosecution of the defendants upon the theory that they were jointly engaged in selling and dealing in whiskey in 1943, from which it claims they received gross partnership receipts not accounted for in their several income tax returns.

Such theory created a presumption, and the court will take judicial notice, that the defendants had costs in connection with acquiring such whiskey, and expenses in selling it. (Sections 21, 22, 23 and 51a, Internal Revenue Code, Title 26, United States Code.) Such presumption, and the facts created by such judicial notice, placed upon the Government the additional burden of establishing beyond a reasonable doubt that the gross receipts from such sales and dealings in property exceeded the cost and reasonable and necessary expenses in acquiring and selling the same. The Government failed to make such proof. The trial court wrongfully decided that *this burden* was upon the defendants (R. 279), and held that *they* should have rebutted the Government's case by introducing evidence of the expenses which they asserted were incurred in the sale of the whiskey, as such evidence would have been admissible under the joint venture, *but not under the dividend theory.* The trial court placed upon the defendants the burden of proving their innocence, and admitted that the cases had been tried by him upon inconsistent theories requiring different evidence to sustain convictions. (R. 279.)

The Court allowed the defendants no costs for the whiskey.

The Court of Appeals erred, to the serious prejudice of each defendant, upon the vital fact of defendants' whiskey cost. It stated in error that an inference could have been assumed by the trial court that such cost might have been claimed by another taxpayer in its tax returns. Such an inference is nowhere assumed by the trial court (R. 275-282) and would have been a violent assumption of a fact without any Record foundation or basis.

The Court of Appeals, without Record foundation or basis, and without any of the objections stated in its footnote on R. 397 having been made or suggested at the trial

(R. 121, 122), erred to the serious prejudice of each defendant by summarily dismissing consideration of defendants' expenses as shown in Government's Exhibits A-13 and A-14; it was manifest error for the Court of Appeals to state that the expenses shown by such Exhibits were items of expenses which defendants' accountant stated he was instructed not to include in the Gary Corporation costs when he was making up its return. (R. 397, 102, 103, 104, 121, 122, and Government's Exhibits A-4, A-5, D-1, D-77, D-78.)

Defendants were prejudiced by the court's acceptance, over defendants' objections, of hypothetical questions and answers by the Government's tax expert, which were incomplete, failed to take into consideration any cost and, without any explanation, only a few expenses. The defendants thereby suffered substantial prejudice, for the questions and answers assumed as true, facts definitely disproved by the Government's own evidence. *Kirsch* v. *United States,* 174 F. 2d 595 (8 C. A.)

The Sixteenth Amendment to the Constitution does not permit, and Congress never intended, that gross receipts from the sale of property should be subject to an income tax. *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179. In Title 26, United States Code, Sections 22 and 23, Congress set up the statutory formula to compute income taxes, which is that the cost of the goods sold shall be deducted from the gross receipts received from the sale and, in computing net income, the statutory deductions such as ordinary and necessary expenses, interest, taxes, salaries, etc., shall be allowed. The net taxable income must be computed according to the statutory provisions, and this has not been done in these cases. The Government has ignored the formula, refused to allow the cost of the merchandise and the statutory deductions and credits, and there is no evidence that

defendants had any gain in 1943 in their liquor transactions; they had a loss.

Question Three.

The error in receiving in evidence and considering statements and the joint venture and amended returns of the several defendants, each of which was made long after the commission of all acts which the Government claimed constituted the offenses charged, was extremely prejudicial to the individual rights of each defendant.

The prejudice is pointed up by Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, not made in the presence of either Weiss or Stryk; this statement was used against all of the defendants by Judge Kerner (R. 395), together with the evidence of Ackerman, Hicks, Palffy and Siemion as to "Beam" whiskey transactions which were had with Rosenblum, with Weiss not present, and concerning transactions which it is admitted Weiss had neither knowledge nor participation (R. 393), and to which testimony Weiss made timely objections because such evidence was hearsay as to him.

It was a violation of the fundamental rights of Weiss and Stryk to have Rosenblum's statement of March 21, 1944, considered against either of them for any purpose; the testimony of Ackerman adopted by Judge Kerner as showing Rosenblum's receipt of side payments of $78,230.00 and $35,000.00, from Ackerman, is very prejudicial to Weiss; the Ackerman transactions were not included in the Stipulation (Government's Exhibit Z) at the trial. At R. 393, Judge Kerner said:

> "Nor was there anything in the stipulation or testimony of the purchaser connecting Weiss with any of the transactions involved in the sale of the Beam whiskey."

Judge Kerner (R. 395, 396) recites further from the hearsay statements of each defendant (Government's Exhibits X-1, U-1, U-2, U-3, V-1, V-2, V-3, V-4 and V-5) and relies upon these to affirm the convictions. The trial court relied on all of these statements for the conviction of all of the defendants on all of the charges. (R. 244, 280, 281, 392.)

Both courts also erroneously considered the partnership or joint venture and the amended individual returns (R. 277, 281, 392, 396); these were hearsay and especially prejudicial because they were clearly and admittedly inaccurate and untrue, were not intended to reflect correctly the defendants' tax liability (R. 101, 105, 115, 116, 119, 120), and were wholly foreign to the charge made in the indictments that the defendants had received "Dividends" which were allegedly omitted from their tax returns. (R. 88, 89.)

The defendants repeatedly objected to the introduction of such evidence, and in response to such objections, the trial judge always assured defendants' counsel that such hearsay evidence was being admitted and would be considered only as applying to each individual defendant concerned, and "against him solely and without prejudice to the others until and unless by PROPER evidence, a conspiracy is shown." (R. 95.)

But the trial court failed to differentiate between the proof relevant to the substantive offenses and that relevant to the conspiracy charged; it was impossible for him to prevent the abuse to the defendants' rights which followed the introduction of said incompetent evidence. (R. 399, 401-402.)

Said several statements cannot be used against any of the declarants for any purpose until, and when, by inde-

pendent extrinsic evidence, *"corpus delicti"* as to him, has been established.

Krulevitch v. *United States,* 336 U. S. 440.
Fiswick v. *United States,* 329 U. S. 211.
Kotteakos v. *United States,* 328 U. S. 750.
Roma v. *United States,* 53 F. (2d) 1007 (7 C. A.).
Gulotta v. *United States,* 113 F. (2d) 683 (8 C. A.).

Question Four.

There is no allegation in either indictment that the defendants were engaged in the same act or transaction, nor in two or more acts or transactions connected together; these allegations must be in the indictments before there can be a consolidation, over objections, of separate individual indictments; Rule 13, Federal Rules of Criminal Procedure. Clearly, the three defendants could not be joined in a single indictment for having separately filed false individual income tax returns, unless it is alleged in the separate indictments that they "have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Rule 8, Federal Rules of Criminal Procedure. There is no such allegation in either indictment. In *DeLuca* v. *United States,* 299 F. 741 (2 C. A.), it is said:

> "The statute makes the test what appears on the face of the bills themselves. It does not depend in any degree upon the order in which the prosecutor intends to bring them to trial."

This principle was approved in *Castellini* v. *United States,* 64 F. 2d 636 (6 C. A.), and is based upon *McElroy* v. *United States,* 164 U. S. 76. Rules 8 and 13 still prohibit consolidation unless the allegations in the indictments show the defendants were engaged in the same acts, or series of acts, or transactions connected together

and such consolidation cannot be built upon the mere assertions of the United States Attorney.

These cases present a typical example of how the fundamental rights of a defendant may be extremely prejudiced by departing from the Rules of this Court relating to consolidation of criminal actions.

The manifest unfairness to the defendants in the proceedings below started with the filing of the bill of particulars by the United States Attorney wherein he abandoned the well defined "Dividend" charge in each indictment. (R. 53, 54, 55.)

Then, he obtained the consolidation order, over the objections of the defendants. (R. 63.)

He realized that there were no allegations in the indictments which would authorize a consolidation of separate indictments against three individuals for filing a false individual income tax return, and he endeavored to supply such essential allegations by his written motion. (R. 62.)

Early in the trial, when the Government admitted that it had no evidence to prove that either defendant had received any corporate dividends which he omitted from his return (R. 88), the court declined to make a finding as required by Rules 23(c) and 29(a) Federal Rules of Criminal Procedure requested by the defendants that the Government had no evidence to prove the dividend theory as charged in the indictment; he said he would not pass at that stage of the case upon what constitutes dividends under the Act of Congress, but he would reserve that until the conclusion of the evidence; he said he could see that there was going to be controversy all through the lawsuit about whether anything in the indictment can be reached under the designation of dividends. (R. 89.)

Thereafter, and through the trial, the defendants were

caught between the contention of the District Attorney that he had no evidence to show that either defendant had received any corporate dividends which he failed to report, and the position of the court that the allegation in the indictments as to dividends "becomes a very material question upon the substantive counts." (R. 259.)

The resulting prejudice to the defendants was highly increased because of the wrongful consolidation, as the court admitted the hearsay evidence including all of the foregoing statements and returns on the conspiracy charge, and then he failed to differentiate between the proof relevant to the substantive offenses and that relevant to the conspiracy charge (R. 399); he was powerless to prevent the abuse which followed the hearing and consideration of such inadmissible evidence in the causes as improperly consolidated. (R. 401.)

When the defendants on their motions for acquittal, urged that they were not prepared to try the substantive counts upon the proposition that the Government was entitled to show anything upon those counts except "Dividends" in the statutory sense as defined by Congress, and they ought then be acquitted (R. 257), the District Attorney urged upon the court his position that:

> With one exception, the defendants were not record stockholders of any of these corporations: that the Grand Jury could not have been charging them with getting dividends because people who are not stockholders can't get dividends of corporations, and the Grand Jury knows that.
>
> "The Court: Yes, but they said dividends."

The United States Attorney:

> "They said dividends, but dividends, Your Honor, in the dictionary means a division of profits. Webster's Dictionary says that it is a division, that which is to be divided. It tells the Latin derivation of it.

A sum of money for division, one of the divisions so made.

Specifically—especially it defines a dividend of corporations, a dividend or profits of a firm or a corporation as a preferred stock paid, a dividend, distribution of shares, or apportionment of a firm. Now, it is my contention that the Grand Jury, knowing that these men were not stockholders, of the corporation, used the word in the common language, and I don't think there is any objection to doing that." (R. 257, 258.)

Mr. Harrell, for the defendants, insisted that,

"Earnings to the corporation and money should have gone into it, but after it became the assets, well, we will properly say of the corporation, then the corporation should have, with its expenses and deductions against its operation, have shown net earnings out of which these moneys should have gone; otherwise, it is not a dividend as defined by statute."

"The Court: *Well that is the question of the case.*" (R. 261.) (Emphasis supplied.)

The court never changed his legal position so announced during and at the close of the trial that the allegation as to the omission of "Dividends" was a very material one (R. 259), and that it "is the question of the case", until he later found the defendants guilty and filed his memorandum opinion (R. 275-282), wherein he decided that evidence of expenses incurred in the sale of the whiskey would have been admissible under the joint venture theory, but not under the dividend theory, and decided that the convictions could rest on Rule 52 of the Federal Rules of Criminal Procedure. (R. 279.)

This was a gross miscarriage of justice, caused by the wrongful consolidation of the causes for trial. As Circuit Judge Duffy points out (R. 400), it was an abuse of judicial process to charge conspiracy when practically the

same offense had been charged in substantive counts; he said the courts have protested vigorously against the current and perhaps growing habit of indicting for conspiracy in addition to the substantive offenses, and that such procedure often constitutes a serious threat to the fair administration of justice, and the Senior Circuit Judges have been pointing out the dangers of such practice since 1925. (R. 401.)

Chief Judge Major concluded that the conspiracy charge had to be reversed because of the failure of the court to differentiate between the proof relative to the substantive offenses and that relevant to the conspiracy charge. (R. 399.)

Circuit Judge Kerner was careful to assert that "We are not to be understood as approving generally of the practice (of consolidation), but it is clear that these indictments could have been included in one indictment of four counts. See Rule 8(a) and (b) Federal Rules of Criminal Procedure". (R. 389.) But this Rule does not authorize consolidation unless there are proper allegations in the indictments; which question, though presented by defendants, was not decided by the Court of Appeals; *Cataneo* v. *United States,* 167 F. 2d 820 and *Rakes* v. *United States,* 169 F. 2d 739, cited by the Court of Appeals (R. 389) do not decide the question defendants present by their petition; there was no claim in either of said cases, as there is here, that there had been an abuse of judicial process in returning a conspiracy indictment, in addition to substantive indictments, and because of a wrongful consolidation thereof, the trial court was powerless to prevent the abuse of getting into the record evidence which would not have been admissible, except for such erroneous consolidation (R. 401), and by reason thereof the trial court was unable to differentiate between the proof relevant to the substantive offense and that

relevant to the conspiracy charge. (R. 399.) It should be observed that in *Rakes* v. *United States,* 169 F. 2d 739, the court said that

> "The several offenses charged in this indictment were not only similar but were based on transactions constituting parts of a common plan, *clear upon the face of the indictment.*" (Emphasis supplied.)

That this question of improper consolidation is an important one in the administration of the federal criminal law is accentuated by the divided opinion of the Seventh Circuit in its case of *United States* v. *Tuffanelli,* 131 F. 2d 890, 893, 894, where Circuit Judge Kerner warned that "it is not good practice to join in an indictment counts charging distinct offenses against separate defendants", and Circuit Judge Major vigorously contended that

> "It is poor consolation to a defendant who is forced to trial, improperly joined with other defendants, for a reviewing court merely to disapprove 'the practice followed' with an expression of doubt that his rights have been prejudiced."

Such question of improper consolidation should be set at rest by the decision of this Court; two judges of the Court of Appeals have held that the substantial rights of the defendants were prejudiced by the failure of the trial court to give them a fair trial on the conspiracy charge; such error cannot possibly be confined to the conspiracy indictment; it affected the rights of all of the defendants in all of the cases. Error being clearly shown in the record, and it further appearing that the error is of such a character that its natural effect is to prejudice defendants' substantial rights, the conviction cannot be sustained.

Conclusion.

This Court should grant the writ as prayed for by each defendant, and upon review reverse the judgments of the lower courts.

Respectfully submitted,

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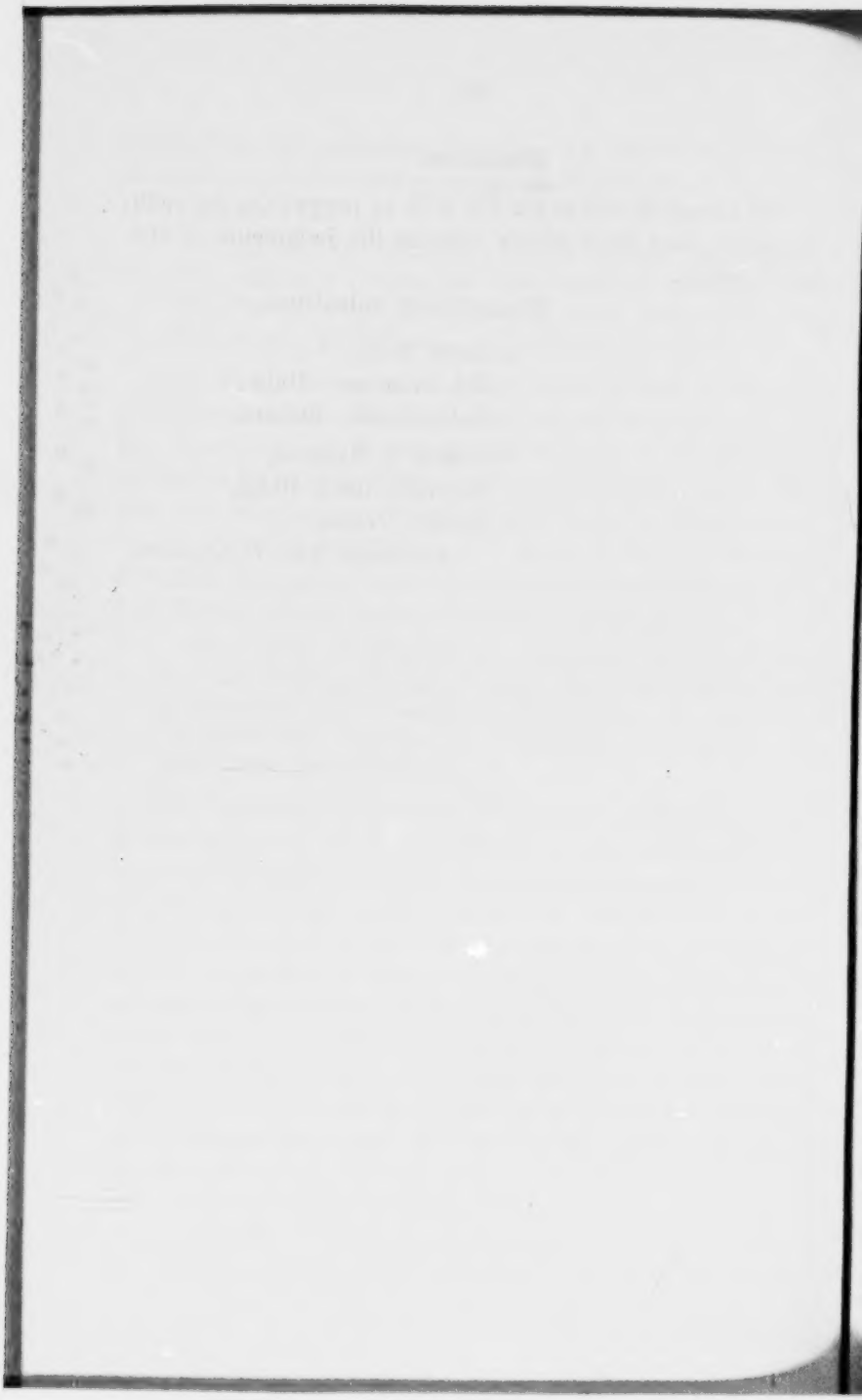

APPENDIX.

EXHIBIT A.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 9718-9723. October Term, 1948, April Session, 1949.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* LOUIS H. ROSENBLUM, *Defendant-Appellant.*	Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.
THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* MAX STRYK, *Defendant-Appellant.*	
THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* JACOB WEISS, *Defendant-Appellant.*	

June 13, 1949.

Before MAJOR, *C. J.*, and KERNER and DUFFY, *JJ.*

KERNER, *J.* These are appeals from judgments of conviction and sentence under four separate indictments. Three indictments charged that defendants wilfully and

knowingly attempted to defeat and evade income tax liability for the year 1943; the fourth charged that defendants conspired with each other, each to evade his own as well as his co-defendants' income taxes for the year 1943 in violation of Sec. 37 of the Criminal Code, 18 U. S. C. A. Sec. 88 now Sec. 371. The indictments were consolidated. A jury was waived and the cases were tried by the court.

Defendants present numerous alleged errors, but grouped together, in substance, they present for consideration the following contentions: That the court erred (1) in failing to dismiss the indictments when the United States Attorney announced he had no evidence to prove that each defendant had received corporate dividends which he failed to report, (2) in consolidating the causes for trial, (3) in overruling motion to dismiss the conspiracy indictment; and (4) that there was no evidence of any wilful intent to evade the tax.

First: The three separate indictments for the substantive offense were based on Sec. 145(b) of the Internal Revenue Code, 26 U. S. C. A. Sec. 145(b), which provides that any person who wilfully attempts in any manner to evade or defeat any tax imposed by the chapter or the payment thereof shall be punished as therein specified. They charged each defendant with having wilfully and knowingly attempted to defeat and evade a large part of the income and victory tax due and owing by him to the United States of America for the calendar year 1943, by filing and causing to be filed a false and fraudulent income and victory tax return. In his return Rosenblum stated that his net income was $36,658.89 and the tax due thereon $18,490.95, whereas, as he then and there well knew, his net income was $210,397.21, upon which net income he owed the United States of America $157,760.36; Weiss stated that his net income was $28,051.04 and the tax due thereon

$12,380.74, whereas his net income was $149,018.86 and the tax thereon was $113,032.04; and Stryk stated that his net income was $37,683.62 and the tax due thereon $18,-829.26, whereas his net income was $211,421.95 and the tax thereon was $158,066.80. The returns in the indictments were alleged to be false in that Rosenblum omitted from the statement of his gross income "Dividends, $145,-022.72"; Weiss omitted "Dividends, $120,967.72"; and Stryk omitted "Dividends, $145,022.74."

The record discloses that in response to defendants' request, the Government, some seven months before the actual trial of the cases, filed a bill of particulars in each case. Except for the different amounts and names, they were substantially the same. In the Rosenblum case it was said there would be no effort to prove that the $145,022.72 listed as dividends under the heading gross income represented corporate dividends; that this money represented dividends or a division of money received by the defendant from a joint venture or joint enterprise in which he, Max Stryk and Jacob Weiss were participants; and that said $145,022.72 was received from the sales of intoxicating liquors.

Based upon this state of the record, defendants contend that the court should have dismissed the indictments. They argue that the word "dividends" used in describing the gross income which defendants failed to report, is a material and necessary part of the indictment, is descriptive of the offense, and must be proved as charged. In other words, to permit evidence that defendants received money as their share of over-ceiling prices from the sale of whiskey, which they failed to report in their income tax returns, would create a fatal variance between the indictment and the proofs to be adduced.

We cannot accede to this contention. We state our reasons briefly. A variance is not regarded as material un-

less it is of such a substantive character as to mislead the accused in preparing his defense or place him in second jeopardy for the same offense. *Berger* v. *United States,* 295 U. S. 78, and *United States* v. *Ragen,* 314 U. S. 513. In the state of this record, there can be no question as to each defendant being protected against another prosecution for the same offense, and it is clear that he was not surprised in any way by the character of the evidence to be adduced. Here, the gravamen or the essential ingredient of the charge was the wilful attempt to evade and defeat the tax. The statute says that every attempt to evade or defeat the payment of income tax is a violation of the law. It is sufficient to charge a defendant with acts coming within the statutory description in the substantial words of the statute. *Capone* v. *United States,* 56 F. 2d 927; *Rose* v. *United States,* 128 F. 2d 622; and *Cave* v. *United States,* 159 F. 2d 464. In our case, the character of the offense with which each defendant was charged, was not changed by the use of the word "dividends." The indictment set forth the facts which made up the charge against each. He was still charged with a wilful attempt to evade and defeat the payment of his income tax. *Hall* v. *United States,* 168 U. S. 632; *Mathews* v. *United States,* 15 F. 2d 139; *Jones* v. *United States,* 72 F. 2d 873; *Panella* v. *United States,* 140 F. 2d 71; and *Ferrari* v. *United States,* 169 2d 353. Hence, that part of the indictment which gave the break-down of the gross income and allowable deductions was surplusage or a mere defect or imperfection in form which did not tend to the prejudice of each defendant, and as such, need not be proved.

Second: The ground urged for reversal is that the court erred in consolidating the four indictments for trial. We are not to be understood as approving generally of the practice, but it is clear that these indictments could have been included in one indictment of four counts. See

Rule 8(a) and (b) Federal Rules of Criminal Procedure, 18 U. S. C. A. following Sec. 687. In such a situation, the question of consolidation is vested in the sound discretion of the trial judge and his decision will be reversed only upon a clear abuse of that discretion. *Cataneo* v. *United States,* 167 F. 2d 820, and *Rakes* v. *United States,* 169 F. 2d 739. No error was committed in consolidating the cases. We think the court exercised a wise and sound discretion.

Third: Defendants contend that the conspiracy indictment should have been dismissed because (a) it did not state facts sufficient to constitute an offense against the United States; (b) it failed to allege whether the conspiracy was to commit an offense against the laws of the United States or to defraud the United States; and (c) it was vague and indefinite, and failed to set out the manner in which the alleged conspiracy would be accomplished.

A conspiracy is a partnership in crime. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 253. A combination of two or more persons by concerted action to accomplish a purpose either criminal or otherwise unlawful comes within the accepted definition of conspiracy. *United States* v. *Hutto,* 256 U. S. 524, 528. And the fact that income fraudulently concealed is derived from an illegal joint enterprise in no way militates against the further charge of conspiracy. It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809.

A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. And the parties may be punished for their agreement to commit a crime as well as for the completed crime—even though the substantive offense is charged as an overt act in the conspiracy indictment.

"* * * For two or more to confederate and combine

together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered." *United States* v. *Rabinowich,* 238 U. S. 78, 88.

In *Pinkerton* v. *United States,* 328 U. S. 640, the defendants were indicted for violation of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. Each of the substantive offenses found was committed pursuant to the conspiracy. The Pinkertons contended that the substantive counts became merged in the conspiracy count and that only a single sentence could be imposed. The Supreme Court, however, refused to accept the proposition that the substantive offenses were merged in the conspiracy. The contrary applies also. In that case, at page 643, the Court said: "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established."

In our case the indictment charged that the defendants "On or about the first day of January, 1942, and continuously thereafter until the return of this indictment * * * unlawfully, knowingly, wilfully, and feloniously conspired * * * together, with each other, and with other persons to the Grand Jurors unknown, to attempt to evade and defeat large parts of the income and victory taxes due and owing and to be due and owing by them, said defendants and each of them, to the United States of America

for the calendar year 1943 by filing and causing to be filed with the Collector of Internal Revenue * * * false and fraudulent income and victory tax returns wherein each of said defendants would state that his taxable net income for income and victory tax purposes for said calendar year was far less than it actually was, and that the income and victory tax due from him for said calendar year was far less than the amounts actually due the United States of America on that account." The indictment also enumerated 23 overt acts averred to have been committed in furtherance of and for the purpose of carrying into effect the purpose of the conspiracy.

We conclude that the indictment stated facts sufficient to constitute an offense against the United States. It was not vague or indefinite. It clearly set forth all the necessary facts to constitute an offense against the United States. See *Capone* v. *United States, supra,* and *Jelke* v. *United States,* 255 Fed. 264.

The point is also made that the defendants may not be convicted upon statements made by them after the alleged conspiracy has ended, and *Fiswick* v. *United States,* 329 U. S. 211, is cited. The argument is that the evidence failed to show any unit of design and purpose or that there had been a combination of the minds of the defendants to file false individual income tax returns for 1943, and that the court based the conviction upon statements of the defendants made long after the alleged conspiracy had come to an end. We disagree. The District Court, in disposing of this contention, said:

> "Obviously the facts constitute beyond all doubt proof of a conspiracy. These three men * * * planned and carried out a scheme whereby, through their dummy corporations, their implements and tools, they were to and did receive $500,000 in un-accounted for income. This is the very essence of a conspiracy."

To this it will be enough for us to say that we have examined the record, and that it discloses evidence of a conspiracy between the defendants from early in 1943 when the defendants first conceived the idea of selling whiskey at over-ceiling prices up to the time when they filed their income tax returns in March, 1944. This will appear more clearly later on.

Fourth: Defendants' main contention is that the evidence was insufficient to sustain the conviction.

In the trial court, defendants admitted that they each had received over-ceiling payments from purchasers of whiskey which had not been reported in their original individual tax returns, and they contended that later in amended returns they reported income from their joint venture and paid the tax thereon. But they argued that these amended returns were erroneous; that the over-ceiling payments represented gross income, and if their legitimate expenses were deducted they actually suffered a loss on their illegal transactions.

The trial judge found that the defendants in fact owned, controlled and manipulated the affairs of the corporations as their tools for the realization of over-ceiling sales of whiskey which they diverted from the corporations to their own resources. This was an illegal joint enterprise. It was reported later as a joint enterprise and each defendant in his amended return accounted for what he then admitted he had received from the joint enterprise and received an additional assessment, which was paid. (There is nothing in the record to indicate that the tax paid was accepted in full payment of the liability or that it represented any compromise.) The court found that the evidence clearly showed a flagrant attempt to defeat taxes on some $500,000 of gross income.

Since the trial judge found the defendants guilty, we

must take that view of the evidence, with inferences reasonably and justifiably to be drawn therefrom, most favorable to the Government and accept as true all facts which the evidence reasonably tended to prove.

In the year 1943 defendants had very extensive dealings in wholesale whiskey sales in two different series of transactions involving whiskey obtained from two different sources. In both, sales were made through regular trade channels of corporations licensed to carry on such sales, with accurate records of all receipts and expenditures by the corporation used, showing sales at regular ceiling prices as established by Office of Price Administration. However, in both sets of transactions, in addition to the ceiling prices received by the corporate sellers, the defendants who owned or controlled these corporate distributors also received side payments in cash representing over-ceiling charges for the whiskey. The two corporate distributors through which all sales were channelled were:

1. Gary Wine and Liquor Corporation of Indiana. Rosenblum and Stryk bought all the stock in this corporation in 1939. Weiss was its attorney.

2. P. and M. Corporation of Illinois. The record stockholders of this were S. Prosterman who was record owner of 98 shares, and L. Mitteldorf, a brother-in-law of Rosenblum, who owned the remaining two shares.

Gary had handled whiskey distributed by J. Beam Company which required it to build up certain reserves of aged whiskey, represented by warehouse receipts. At the end of 1942, Gary had 547 barrels in reserve. Early in 1943, it bought 1,500 additional barrels, making small payments from corporate funds, and for the balance, Rosenblum and Stryk gave their personal notes in order not to impair the credit standing of the corporation.

The facts relating to the sales of this Beam whiskey were

established largely by stipulation. From April 19 to July 27, a total of 210 barrels and 6,584 cases of whiskey were sold through Gary for total invoices of $159,826, and Rosenblum and Stryk received a total of $99,799 in cash as side payments for these same sales. Four sales not covered by the stipulation were established by the evidence of the purchasers as follows:

		—Paid checks—		
	Bought	For regular invoice	Expense	Cash on side
Ackerman	215 bbls.	$13,144	$59,125	$78,230
"	100	7,040	30,000	35,459
Palffy	30	2,354	9,535	22,604
Ruby	114	6,313		24,000

The first three payments were made to Rosenblum or Stryk, but the fourth was to a different party, and there was no testimony to show that either of them received it. This last cash payment was made to Gardner, an officer of Beam which held the whiskey in warehouse. Nor was there anything in the stipulation or testimony of the purchaser connecting Weiss with any of the transactions involved in the sale of the Beam whiskey.

In 1943 negotiations were started for the purchase of the capital stock of a corporation which owned a large quantity of whiskey. These negotiations were carried on by Weiss who paid $50,000 for an option to buy Judge and Dolph, Ltd. of Wisconsin, engaged in the wholesale liquor business in Milwaukee and having franchises from the Seagram, Frankfort, and Fleishmann Companies. The stock of this corporation was owned by a holding company, Judge and Dolph of Illinois, which was in turn a subsidiary of Walgreen Drug Company. Weiss assigned his option to a newly formed corporation, Staple, Inc., incorporated as a holding company with himself and his wife as stockholders. Staple, Inc. paid the $370,000 balance of the $420,000 pur-

chase price agreed upon for the sale of the entire capital stock of Judge and Dolph, Wisconsin. The parties also agreed to and did pay off a $140,000 indebtedness to Judge and Dolph, Illinois. On August 2, 1943, Staple took over Judge and Dolph, Wisconsin with all its assets including its franchises, permits, licenses, accounts receivable, and 2,431 barrels and 5,037 cases of whiskey. The $50,000 paid by Weiss for the option was supplied by Rosenblum and Stryk from the proceeds of the side or over-ceiling payments on their sale of the Beam whiskey, and $334,000 of the $370,000 (paid by Staple, Inc.) was supplied by advance deposits for the sale of the Judge and Dolph whiskey. The balance was loaned by Weiss. (The business of Judge and Dolph, Wisconsin was later carried on under the name of Milwaukee Liquor Corporation, and Weiss moved to Milwaukee to operate the business.)

In order to market the Judge and Dolph whiskey the defendants arranged for the organization of the second distributor corporation, P. & M. of Illinois. A three-party contract was entered into between P. & M., Weiss, and Staple, Inc., providing for reimbursement for the purchase price of the Judge and Dolph, Wisconsin stock and for the bottling and sale of the whiskey. Although Prosterman and Mitteldorf were the record stockholders, Prosterman never had physical possession of the stock—98 of the one hundred shares of which stock were in his name. Rosenblum asked Prosterman to head the company and said he would be in a position to supply the liquor for it to handle. The arrangement was that Prosterman and Mitteldorf were to receive a commission for selling the whiskey at OPA ceiling prices. However, they made no sales themselves, referring all potential purchasers to Rosenblum. They never had either whiskey or certificates at their place of business. Sales were channelled through the corporation, and Prosterman and Mitteldorf received commissions there-

for which were paid to them by the corporation out of its receipts for sales at regular ceiling prices. The corporation's bank account of $10,000 was opened by Prosterman, Mitteldorf and Stryk—with the latter supplying the cash for it.

The defendants stipulated that sales of the whiskey acquired from Judge and Dolph, Wisconsin in the amount of 25,990 cases and 45 barrels were made through P. & M. for a total of $529,249 invoice price and that Rosenblum received an additional $313,036 in cash. During the year 1943 Rosenblum received the following amounts in cash as side payments on the sale of wiskey: $99,799, Beam, as stipulated; $136,293, Beam, as testified by purchasers; and $313,036, Judge and Dolph, as stipulated, or a total of at least $549,128. (This excludes an additional side payment to one Gardner which was not shown to have been turned over to Rosenblum and which—$24,990—Gardner testified was the regular invoice price to P. & M.) No report, as we have already observed, was made of the receipt of this over half million dollar income from the sale of whiskey in any of the original tax returns of Rosenblum, Stryk, or Weiss for the year 1943, and their accountant who made out their returns testified that they told him nothing about it at that time.

In March, 1944, Rosenblum appeared before the Alcohol Tax Unit apparently in connection with an investigation then being conducted in Ohio relating to the Ackerman purchases. He then made a statement as to his dealings in the 315 barrels of Beam whiskey for which the record shows his receipt of side payments of $78,230 and $35,000 in cash paid by Ackerman. He denied these cash payments—denied that he or Stryk had received any payment except the checks for the regular invoice price for the two lots of whiskey. Later, in May and June, 1945, Weiss alone first, and then Weiss and Rosenblum, and Weiss and Stryk,

appeared before the Intelligence Unit of the Bureau of Internal Revenue to testify as to their dealings in whiskey. In the first of these interviews, on May 16, Weiss described his early relations with Rosenblum and Stryk and his virtual partnership with them in the Gary business. This close relationship he said led up to their approaching him when they were considering the purchase of Judge and Dolph, Wisconsin, and his participation in negotiations leading to the purchase. He stated that in working out the details of the contract there was discussion that "there must be 'justification' for this whole picture in case inquiry should be directed against this transaction by the authorities, and on this basis many of the details * * were worked out * *. We had agreed in our conversation * * that we would pay that price which eventually would be computed out, but that any dollars and cents * * actually was to be reduced or increased to an even dollar figure so that the tracing would be difficult. * *"

Subsequently, Weiss stated that the "total price paid for the 116,509.83 gallons of whiskey (5,037 cases) paid by us to Judge and Dolph of Illinois $403,869.62 * * in addition to which we were to purchase the stock of the corporation for its net worth value which subsequently developed to be $30,068.88, and we agreed to pay off $140,000 * * owed by Judge and Dolph of Wisconsin to Judge and Dolph of Illinois."

Weiss further stated that in addition to the $50,000 Rosenblum and Stryk handed to him to pay for the option, they gave him $75,000 in federal bonds to secure a loan to use in paying the $140,000. "The money so received from Mr. Rosenblum and Mr. Stryk totalled $160,000."

During the course of the same series of interviews Rosenblum admitted the receipt of $363,000 in cash in excess of the P. & M. invoice prices which amounted to $974,279 on a series of sales. This $363,000 he said was paid over to

Staple, Inc., to be used in payment of the whiskey and capital stock of Judge and Dolph, Wisconsin and in reduction of the debt. He also stated that although he did not represent P. & M. in any way and had nothing to do with its operations or any share in its profits, he could guarantee delivery by it of any orders he took for the sale of liquor—that there was no agreement as to that, but an understanding.

Stryk stated that they intended to report the income for tax purposes but "it became such a hot potato we didn't know how to. We intended to do it this year (1945). At that time we didn't know how to work it out." In case of a sale by Milwaukee Liquor Corporation, he "got a third of it." He denied ever handling any of the overceiling cash but admitted putting packages given him by Rosenblum which he knew contained money into his safety deposit box.

In June, 1945, Weiss was living in Milwaukee and gave as his occupation "chairman of Milwaukee Liquor Corporation." (This was the successor to Judge and Dolph of Wisconsin which was, thus, still operating as a wholesale wine and liquor business.) He said he also maintained a law office in Indianapolis for "sketchy or remnant practice of law."

As a result of the investigation and interviews, Weiss, Rosenblum and Stryk all filed a delinquent partnership return for the year 1943, setting up gross receipts of $512,510 and ordinary net income of $142,279. The merchandise on which this was based was the 2,431 barrels and 5,037 cases of whiskey for which the net cost was stated to be $389,931. An explanation of the filing was attached to the return stating that it was to make clear that the transactions by Staple, Inc., were in fact those of Rosenblum, Stryk and Weiss.

Defendants cite the case of *Spies* v. *United States,* 317 U. S. 492. They claim that the evidence fails to show that defendants knew that they owed a tax and that without justifiable excuse they failed to report it. They insist that something more is required than the doing of the act proscribed by the statute. There must be proof of an evil motive to accomplish that which the statute condemns.

To be sure, to establish its case the Government must prove not only an attempt to wilfully defraud it but also that a tax in addition to what the taxpayer had already paid remains due and owing, *Gleckman* v. *United States,* 80 F. 2d 394, and *Tinkoff* v. *United States,* 86 F. 2d 868, but it is not necessary to prove an evasion of the entire amount alleged in the indictment; the proof is sufficient if it shows any substantial portion of the tax liability to have been wilfully evaded. *United States* v. *Schenck,* 126 F. 2d 702. See also *United States* v. *Johnson,* 319 U. S. 503, 517. Nor is direct proof of wilful intent necessary. It may be inferred from the acts of the parties, and such inferences may arise from a combination of acts. *Battjes* v. *United States,* 172 F. 2d 1, 5.

Defendants assert that they are entitled to their costs of the whiskey, $466,039.32, and their expenses in selling it, $145,506.07, and when these items are allowed, they had a loss of $99,035.37. They also claim that two exhibits[1] identified by the Government but introduced over the objection of the district attorney, show expense items for which they were not given credit. Hence they argue there was no evil motive or want of justification.

In this connection we note that P. & M., in its return, reported a gross income of $974,279 against which it

1. These exhibits A-13 and A-14 were schedules which defendants' accountant stated showed items of expense which he was instructed not to include in the Gary Corporation costs when he was making up its return. The items were not verified—there was nothing to indicate their source or accuracy—no basis was laid for their allowance, and the accountant did not profess to know anything about the authenticity or the truth of the items.

charged $840,961 as cost of goods. The only goods that P. & M. sold was the Judge and Dolph whiskey, hence the trial court could infer that the item of $840,961 included all legitimate charges in addition to the original cost of the goods.

The question of wilfulness is one of fact to be determined by the jury or the trial judge from all the circumstances, *Spies* v. *United States, supra,* 499; *Maxfield* v. *United States,* 152 F. 2d 593; *United States* v. *Lange,* 161 F. 2d 699; and *Battjes* v. *United States, supra.* So here, we have a deliberate omission from the return of income which each defendant subsequently admitted knowing should have been included in his return—a deliberate falsification of the return, and not just the default in filing return or paying tax which the court held, in *Spies* v. *United States, supra,* was insufficient of itself to sustain a charge under Sec. 145(b). A fraudulent return is always an attempt to evade a tax. *Rick* v. *United States,* 161 F. 2d 897, 898. After investigation started, each defendant filed an amended return disclosing a part of the income previously omitted. Under similar circumstances, the court, in *Cave* v. *United States, supra* (decided after the *Spies* case), held that the Government was not required to prove more than that there was wilfully unreported income to sustain a conviction under the statute. See also *Murray* v. *United States,* 117 F. 2d 40.

We conclude that there was sufficient evidence to sustain the court's finding that each defendant was guilty of an attempt to evade payment of his income tax by means of filing a false and fraudulent return. The writer is of the opinion that the court could infer that defendants who unquestionably acted in concert in their black market operations, also combined in their attempts to evade payment of taxes, and that intent to evade such taxes was one of their motives in concealing the income they received from the over-ceiling

prices of the sale of whiskey and omitting it from their returns. However, my colleagues do not agree, and have filed separate opinions as to the indictment charging conspiracy. Hence the judgments of conviction as to the three indictments charging the substantive offenses will be affirmed, and the judgment as to the indictment charging conspiracy will be reversed.

MAJOR, *C. J.* I concur in Judge Kerner's opinion in all respects except as it relates to the indictment which charges conspiracy, and as to this charge I would reverse. The substantive offense charged in each of the indictments other than the conspiracy indictment was that the defendants "did wilfully and knowingly attempt to defeat and evade." Not only was the case tried, but the conviction on these substantive offenses rests, on the theory that the defendants were engaged in a joint enterprise. Thus the government justifies the variance between the proof and the allegation of the indictments on the ground that the income described in the indictments as "dividends" was received as the fruits of a joint venture. The consolidation of the indictments for trial over the objection of the defendants is also justified, in part at least, upon the same premise. And throughout the memorandum of findings by the lower court runs the thought, both tacit and express, that the defendants were tried and that they were convicted as partners engaged in a joint venture or enterprise. It therefore seems plain that the defendants in the substantive indictments have been convicted as participants in a joint enterprise designed to "attempt to defeat and evade." In the conspiracy indictment they have been convicted of concerted action "to attempt to evade and defeat." Any difference between concerted action to commit an act and participation in a joint enterprise to commit the same act is not discernible to me. "A conspiracy is a partnership in crime." *United States* v. *Socony-*

Vacuum Oil Co., 310 U. S. 150, 253. And in my view, a joint enterprise conducted for an illegal purpose is likewise a partnership in crime. I think the judgment premised on conspiracy should be reversed because under the peculiar circumstances of the case it embodies the same crime as that based on the substantive charges.

A more conclusive reason for reversal, however, arises from the failure of the court to differentiate between the proof relevant to the substantive offense and that relevant to the conspiracy charge. I understand the government to concede that the conspiracy came to an end in March of 1944, when the defendants filed their alleged false and fraudulent returns for the calendar year 1943. In any event, the filing of such returns are the latest overt acts alleged (see overt acts 21, 22 and 23). Such being the situation, the admissions, statements and acts of the individual defendants made or performed after the termination of the conspiracy were not admissible and cannot be considered as proof of that charge. *Fiswick, et al.* v. *United States,* 329 U. S. 211, 215-217. The record unmistakably discloses, however, that the strongest and most convincing proof which the government offered related to statements made by the individual defendants in conferences with government officials which finally culminated in the filing of amended returns some two years after the termination of the conspiracy. Assuming this evidence was proper as admissions against interest, as I think it was, it could properly be considered only as to the substantive offense. The record shows conclusively, however, that this character of proof was utilized in support of the conspiracy charge. In the absence of such proof, I doubt if there is any proper support for the conspiracy conviction but, whether so or not, the fact is that this damaging testimony, inadmissible on the conspiracy charge, was relied upon to convict and is here relied upon by the government to sustain such conviction.

DUFFY, *Circuit Judge.* As I disagree in part with the opinion of Judge Kerner and am not in entire agreement with the opinion of Chief Judge Major, a brief separate opinion seems in order.

Viewing the evidence in the light most favorable to the government, together with all reasonable inferences to be drawn therefrom, I agree that the judgments of conviction must be affirmed in so far as they relate to the three indictments on the substantive offenses. However, as to the indictment charging conspiracy, I think there must be a reversal.

I can well understand the difficulty Judge Major has in ascertaining any real difference between the charges contained in the three indictments alleging substantive offenses aud the charge in the conspiracy indictment. At best only a very fine line can be drawn between the charges that these defendants participated in a joint adventure to attempt to defeat and evade the federal income tax and the charge that by concerted action they agreed to attempt to defeat and evade such tax. This is the kind of a case, in my opinion, where it is an abuse of the judicial process to charge conspiracy when practically the same offense has been charged in substantive counts.

I recognize that the old doctrine of merger of conspiracy in the substantive crime has not obtained in this country (*Pinkerton, et al.* v. *United States,* 328 U. S. 640, 650), and that it is only an identity of offenses which is fatal (*Gavieres* v. *United States,* 220 U. S. 338, 342); yet the facts in this case bring it at least within the shadow of the rule stated in the *Pinkerton* case, *supra* (p. 643):

> "* * * There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime. * * *"

Nevertheless I am convinced, albeit reluctantly, that under the Supreme Court cases cited by Judge Kerner the conspiracy indictment was good as against the attack made that it was practically identical to the indictments charging substantive offenses, and thus did not adequately charge the crime of conspiracy. In the *Pinkerton* case, *supra,* the court said (p. 644): "Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses." In that case the court held in effect that conspiracy is equivalent in law to aiding and abetting. The substantive offenses here charged were attempting to defeat and evade the tax. The charge that the defendants entered into an agreement to make such an attempt was a statement of a separate offense under the decisions cited.

Courts have protested vigorously against the current and perhaps growing habit to indict for conspiracy in addition to the substantive offense, and have pointed out that such procedure often constitutes a serious threat to a fair administration of justice. *Krulewitch* v. *United States,* 336 U. S. 440, 445-446. As far back as 1925 the Conference of Senior Circuit Judges pointed out the dangers of such practice. And any judge with trial court experience knows that the charge of conspiracy in an indictment is often used at the trial for the purpose of getting evidence into the record which would otherwise be inadmissible, and that the trial judge is often powerless to prevent such abuse. As was stated in the *Krulewitch* case, *supra* (p. 453), "But the order of proof of so sprawling a charge is difficult for a judge to control."

Whenever in the estimation of the trial judge the conspiracy count has been added to the indictment for the purposes hereinbefore stated, he can dampen the prosecutor's enthusiasm for such practice by imposing a sentence on the conspiracy count which will be concurrent with that

imposed on the substantive count or counts; but he cannot entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge.

I agree with Judge Major that the conviction for conspiracy was based almost entirely on statements made by defendants long after the termination of the conspiracy and upon the amended tax returns filed by the defendants nearly two years after the conspiracy had ended. Certainly such statements and the filing of the amended returns were not made pursuant to and in furtherance of the objectives of the conspiracy.

The only possible basis for the consideration of such evidence on the conspiracy charge was the theory adhered to by some courts (see: *United States* v. *Krulewitch,* 167 F. (2d) 943, 948; *United States* v. *Goldstein,* 135 F. (2d) 359; *Murray* v. *United States,* 10 F. (2d) 409) that there necessarily was an agreement among the alleged conspirators to conceal the violation after as well as before the illegal plan is consummated. I believe this theory has now been definitely discarded. *Krulewitch* v. *United States,* 336 U. S. 440, 443.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

Nos. 368, 369, 370

LOUIS H. ROSENBLUM,
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vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

MAX STRYK,
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vs.
UNITED STATES OF AMERICA,
Respondent-Appellee Below.

JACOB WEISS,
Petitioner-Appellant Below,
vs.
UNITED STATES OF AMERICA,
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SEPARATE AND SEVERAL REPLY BRIEF OF PETITIONERS.

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SEPARATE AND SEVERAL REPLY BRIEF OF PETITIONERS.

This reply is directed first to the subject of "Questions Presented" on page 2 of the Government's Brief in Opposition, and the argument on such questions appearing on pages 13 to 21, inclusive; after which, reply will be made hereinbelow to the "Statement" as made in said brief on pages 4 to 13, inclusive.

QUESTIONS PRESENTED.

In stating the questions presented, and in argument thereof, the Government has not responded to the crucial points presented by the petitioners.

Question One.

On page 2 of its brief, the Government states question one to be, Whether there was a fatal variance between the charge contained in the indictment and the proof.

The Government's argument on this question on pages 13-16 is too confined in that it says petitioners' complain merely of the allegation describing the nature of the income which they failed to report. It is then said on page 15, that "Had this allegation which itemized gross income been eliminated, the indictment would still have sufficiently charged a violation of Section 145(b), Internal Revenue Code". The Government relies on *Cave* v. *United States*, 159 F. 2d 464 (8th C. A.), certiorari denied, 331 U. S. 847, to support this statement. The *Cave* case does not support the contention of the Government, as the question there was whether the indictment charged a violation of Section 145(a) or 145(b).

However, in *Singer* v. *United States*, 58 F. 2d 74, the Third Circuit decided that itemization of gross income was an essential element of an indictment; there is, therefore, a conflict between the decision of the Seventh and Eighth Circuits, and that of the Third Circuit, upon this material question; and the decision of the Seventh Circuit in our cases is in conflict with the applicable decisions of the Supreme Court in *Cole* v. *Arkansas*, 333 U. S. 196;

DeJonge v. *State of Oregon*, 299 U. S. 353; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Carll*, 105 U. S. 611; *United States* v. *Hess*, 124 U. S. 483; *United States* v. *Britton*, 107 U. S. 655; *Spies* v. *United States*, 317 U. S. 492, 499. (Pet. 16.)

On page 15 of its brief the Government states that "The allegations with respect to gross income were in effect surplusage". The Government relies on *Hall* v. *United States*, 168 U. S. 632; *Glover* v. *United States*, 125 F. 2d 291 (C. A. 5th), certiorari denied, 316 U. S. 690; *Leche* v. *United States*, 118 F. 2d 246 (C. A. 5th) certiorari denied, 314 U. S. 617, rehearing denied, 314 U. S. 712, to support its theory that such allegations were *in effect* surplusage. It should be observed that this position of the Government is equivocal, and the Government itself is in doubt as to whether such allegations are surplusage, and it has made no effort to answer petitioners' contention that such allegations became very prejudicial to the substantial rights of the petitioners as set out in paragraph B, pages 17 and 18 of their petition.

The *Hall* case, *supra*, is not similar; in that case, the indictment contained all of the essential statutory allegations involved in the offense charged; it further contained an allegation which was no part of the offense; the Court decided that under such circumstances, the allegations which formed no part of the offense charged need not be proved; that the character of the offense, as provided by the statute, was not changed by the unnecessary averment. In our cases, the allegation as to the break-down of gross income was an essential part of the offense charged, and the *Hall* case is clearly distinguished.

But if it is held that such break-down was not necessary, then the allegation as to such break-down falls within the class of cases which hold that where such allegations are made as being descriptive *of the manner* in which the

alleged offense was committed, they must be proved as alleged. *Hall* v. *United States,* 168 U. S. 632, 639.

Glover v. *United States,* 125 F. 2d 291 (5 C. A.) and *Leche* v. *United States,* 118 F. 2d 246 (5 C. A.), are mail fraud cases, and are not analogous to the question here presented; in the *Glover* case, Circuit Judge Hutcheson filed a very strong dissenting opinion upon the importance of essential allegations in an indictment.

If it can be held that these cases of the Fifth Circuit do decide that such allegations were surplusage, then such decisions and the decision of the Seventh Circuit in our cases, are in conflict with the Third Circuit in the cases of *Singer* v. *United States,* 58 F. 2d 74 (3rd C. A.), and *Kutler* v. *United States,* 79 F. 2d 440, 442 (3rd C. A.), on this question of fundamental law and criminal procedure which should be settled by a decision of this Court in the instant cases.

As was said by Judge Davis speaking for the Third Circuit in the case of *Kutler* v. *United States,* 79 F. 2d 440, at page 442

> "Where there is an allegation which describes, defines, qualifies, or limits a matter material to be charged, it is taken as a descriptive averment, and the general rule is that it must be proved as laid, even though such particularity of description was unnecessary. *Trice* v. *State,* 116 Ga. 602, 42 S. E. 1008; *United States* v. *Howard,* 26 Fed. Cas. 388, No. 15,403; *State* v. *Lashus,* 67 Me. 564; *State* v. *Langley,* 34 N. H. 529; *Commonwealth* v. *Dejardin,* 126 Mass. 46, 30 Am. Rep. 652."

To the same effect is *Hall* v. *United States,* 168 U. S. 632, 639.

Ours is such a case—corporate dividends were charged by the Grand Jury as having been received, upon which the charge of tax evasion is predicated.

On page 15 of its Brief, the Government says that

> "Had the indictment alleged a failure to report *corporate* dividends, there might be some basis for petitioners' argument."

It is to be noted that Section 145(b) under which the prosecution was had is part of the same statute which includes Section 115(a) defining the word "dividends". The crime, if any, was alleged to be a violation of the Internal Revenue Code, of which both the said sections are a part, and these sections are *in pari materia* and must be construed together. There can be no crime of tax evasion unless something that is commanded or defined in the statute was violated. Dividends has a fixed Congressional meaning and can mean only *corporate* dividends, as defined in said Section 115(a). The Government cannot go outside the statute itself and seek other sources by dictionary or common usage to give a statutory word a different meaning.

The Government concedes that petitioners' argument is sound if the indictments charge the omission of *corporate* dividends; this admission is highly significant and becomes very important upon the question of the granting of the writ in these cases.

Petitioners were deceived and misled by the holding of the court throughout the trial that the issue was one of law as to the meaning of the word "dividends" as defined by Congress in Section 115(a). Internal Revenue Code, which he would not decide until after the evidence was in (R. 89, 257, 259, 260, 261, 278, 279); petitioners gave up their right to a trial by jury when the District Attorney alleged in his Bill of Particulars that there was no evidence to show that any of the defendants had omitted corporate dividends from his return, and the holding of the trial court that the "dividend" charge in each indictment was a very material question upon the separate sub-

stantive charges, was highly deceptive to petitioners, and petitioners were thereby prejudicially deceived as to whether any evidence should be introduced by them. Petitioners claim that by the combination of all of these unusual circumstances which occurred at their trial, their several convictions upon the joint venture theory was a clear violation of rights guaranteed them by the Fifth and Sixth Amendments to the Constitution, and, in deciding otherwise, the Court of Appeals has unquestionably misconstrued and misapplied Rule 7(c) and Rule 52(a) of the Federal Rules of Criminal Procedure for the District Courts of the United States.

The argument of the Government on page 15 of its Brief that petitioners were not surprised nor misled is beyond the point. The fact that the District Attorney, in his answer to motions for bills of particulars, stated that the term "dividends" in the indictments was used to describe a division of profits from a joint venture, and not corporate dividends, could not change the indictments; it could not change the charge as laid in the indictments.

It cannot be treated *in the sense* that the indictments were changed or physically altered by striking therefrom a word fixed and defined by Congress and alleged by the Grand Jury as the essence of the crime, nor can the indictment be changed or altered by adding thereto dictionary meanings or words of common usage distinctly different from that fixed by Congress and used by the Grand Jury. *Edgerton* v. *United States,* 143 F. 2d 697 (9 C. A.); *Dodge* v. *United States,* 258 Fed. 300, 305 (2 C. A.), *Ex Parte Bain,* 121 U. S. 1, 13; *United States* v. *Norris,* 281 U. S. 619.

The Government does not answer petitioners' claim that the entire procedure in the trial court was prejudicial to their constitutional rights as set out in paragraph B, pages 17 and 18 of their Petition. Rule 52(a), Federal Rules of

Criminal Procedure for District Courts of the United States does not apply where prejudicial error to the defendants is affirmatively shown by the record as it is in these cases. *Kotteakos* v. *United States,* 328 U. S. 750; *Fiswick* v. *United States,* 329 U. S. 211.

Rule 52(a) cannot be used as a shield to protect the illegal procedure to which petitioners were subjected in the trial court:

(a) by a course of procedure which led them to surrender their right to a trial by jury upon questions of fact, which, for the first time, after the trial was closed, became controverted issues,

(b) by trying, and convicting them for the offense of omitting income from receipts of sales of whiskey in a joint venture, upon indictments which charged the omission of "dividends" and "capital gain",

(c) by trying them on different offenses and different indictments wrongfully consolidated,

(d) by receiving, and considering in evidence, against all of the defendants the several statements, made by the individual defendants long after the complete commission of all acts charged by the Government to have had relation to the alleged crimes, which did not conform to the Stipulation (Government's Exhibit Z),

(e) by receiving, and considering in evidence, the concededly incorrect Joint Venture and individual amended returns, prepared in conjunction with the Revenue Agents to effect a settlement, and for that purpose only, filed, on August 11, 1945, months after the first voluntary appearance of the defendants, and seventeen months after the last overt act alleged in the conspiracy indictment, which also was the act alleged to have been the crime in the substantive indictments,

(f) by attempting to sustain the convictions without evidence to support the charges as laid in the indictments and without having any definite theory upon which to predicate such conviction,

(g) and by convicting petitioners of having received dividends which were not reported, when the Government had stipulated with them that the money received and not reported was "gross receipts" to Rosenblum from the sale of liquor.

United States v. *Miro,* 69 F. 2d 58 (2d C. A.), and *United States* v. *Simmons,* 96 U. S. 360, cited on page 16 of the Government's brief, are not in point; the *Miro* case does not give consideration to indictments like ours which use words of statutory definition in defining and describing the manner and method in which the alleged offense was committed. In our cases, the gist of the offense charged is the alleged attempt to evade *in the manner* set out in the indictments.

This Court, in *United States* v. *Simmons, supra,* at page 363, very clearly points out that where a word of statutory definition is used in an indictment, such word is distinct and is used to advise the accused of the offense charged.

In our indictments, the Grand Jury used the word "Dividends" as it is defined by Section 115(a), Internal Revenue Code, for the purpose of advising the petitioners of the nature of the offense charged, and such indictments therefore allege a failure to report *corporate* dividends. Such allegation cannot be treated as surplusage.

The indictments in our cases alleged that the falsity in the tax returns consisted of omitting "Dividends" therefrom; all during the trial, the court held that this was a material allegation. The procedure in our cases was prejudicial, deceptive, and affected the substantial rights of petitioners. *Fiswick* v. *United States,* 329 U. S. 211; *Kotteakos* v. *United States,* 328 U. S. 750.

We urge that there has been a total failure of proof as to the charge laid in the several indictments; the Government abandoned the charge in the several indictments, and the Court based the convictions upon the bills of particulars;

the case of *Berger* v. *United States,* 295 U. S. 78, 82, cited on page 14 of the Government's brief does not decide the questions thus presented by our petitions. (Pet. 17, 18.)

The government evades the issues raised by the Petition and ignores the decisions of this Court which decide that no principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, are among the constitutional rights of every accused in a criminal proceeding in all courts, State or Federal. *Cole* v. *State of Arkansas,* 333 U. S. 196-201; *DeJonge* v. *State of Oregon,* 299 U. S. 353.

Question Two.

None of the matters referred to by the Government in its response to petitioners' Question Two shows that petitioners owed any tax; nor do they show that there was any proof at all of corpus delecti; the response of the Government tends to show nothing more than that Rosenblum had received gross income. This does not answer petitioners' claim that their costs and expenses of the whiskey sold must be deducted from gross receipts before they can be charged with having any net income; it does not answer their claim that they sustained a loss on the sales of liquor. (Pet. 19-20.)

The failure to sustain or attach any tax failure to petitioner Weiss is attempted to be bolstered by the Government by associating him with the others as their attorney in which capacity he handled funds for them as a fiduciary in a representative capacity. Not a scintilla of evidence is in the Record that he in any measure received income upon which he failed to pay the tax. That $126,000 *face* (not actual) value in stock of the Milwaukee Liquor Corporation was issued in his name merely as a bookkeeping

entry to straighten out the accounts payable on the books of that corporation (R. 144).

In any event, nobody was enriched by the issuance of this additional $126,000.00 face value stock. Petitioners owned all of the stock theretofore issued, they owned all of the stock after the issuance of the additional shares; 100% remains 100% ownership whether stated in 1 share or 1000 shares, of whatever face value.

The Court cannot permit a conviction to stand merely upon the suggestion of the Government that petitioners *believed* they had net income as stated by the Government in its brief on page 17. There must be evidence in the Record showing such tax, and such evidence must be independent from the statements made by the defendants upon that subject.

In its brief, the Government has taken the position that was adopted by the prosecution in *United States* v. *Fenwick,* Cause No. 9895, in the Seventh Circuit, decided on November 4, 1949 (not officially reported, but for convenience is set out as an appendix to this brief), of relying on admissions and extra-judicial statements of the defendants to establish corpus delicti. The Seventh Circuit, in the *Fenwick* case, very clearly decided that "the conviction cannot stand unless there is proof of the corpus delicti; existence of which cannot be presumed or established by an extrajudicial admission. The Government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. * * * In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax."

Measured by this present rule of the Seventh Circuit in the *Fenwick* case, and which is of course the law, we very

earnestly insist that the Government has wholly failed to respond to our Question Two. It has not shown that petitioners owed any tax which they did not pay. There is an utter failure of *independent* proof of "corpus delecti."

We believe that the statement in Government's brief on page 17, "all expenses which the investigating agents were able to find were allowed in determining net income" is clearly not justified by the Record. None of the Revenue Agents who took the witness stand—neither Johnson (R. 231-233), nor Ruggaber (R. 233-243, 245-247), nor Turner (R. 232-233)—testified, even remotely, regarding any expenses in any amount, to be allowed or disallowed. Witness Ruggaber's testimony was entirely hypothetical, and of probative value only, to the extent, that he indicated where the Government was in error in the assumptions in its hypothetical questions.

But, on page 17 of its brief, the Government says that the only evidence offered by the petitioners in proof of any additional costs was Government's Exhibits A-13 and A-14; these exhibits show petitioners' expenses; Defendant's Exhibit 6 shows the *cost* of the liquor. The Government further says on page 18 of its brief that it was incumbent upon the petitioners to prove any additional costs not reflected in their returns, and cites *Barrow* v. *United States*, 171 F. 2d 286 (C. A. 5th), to sustain its position; that the *Barrow* case has no application to ours, and that the trial court was, and the Government is, in error in stating that the burden was upon the petitioners to prove their costs, is shown by the decision of the Seventh Circuit in *United States* v. *Fenwick, supra,* where it is said:

> "Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that,

> when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt."

There is no law that required the petitioners to show the costs and expenses had in connection with the purchase and sale of the liquor in question; costs and expenses are presumed when, as here, dealings are had in mercantile transactions, and the burden is at all times on the Government to show that such costs and expenses were less than the gross receipts. *Doyle* v. *Mitchell Bros. Co.*, 247 U. S. 179.

The Government was not entitled to rely upon the costs reflected in petitioners' returns. *Forte* v. *United States*, 94 F. 2d 236 (C. A. D. C.); *Pines* v. *United States*, 123 F. 2d 825; *Gordnier* v. *United States*, 261 F. 910 (9 C. A.).

On page 18 of its brief, the Government says that even if Government Exhibits A-13 and A-14 constituted competent evidence, the Government was not bound by such evidence and the trial court was warranted in ignoring it; *United States* v. *Palese*, 133 F. 2d 600 (3 C. A.) and *United States* v. *Reginelli*, 133 F. 2d 595 (3 C. A.), are cited to support its position. Such cases do not sustain the Government as to such exhibits. Said cases relate to the right of a jury to accept that portion of the testimony of a witness which it deems credible and reject the remainder. But such rule does not apply to Exhibits A-13 and A-14; the court below could not take Exhibit A-12, which was the "boiled down" sheet prepared by Government's witness Richardson showing the "gross receipts" of the petitioners, and at the same time ignore A-14, which contained conclusively the uncontroverted statement of the expenses

of collecting and gathering the "gross receipts" shown on A-12; both A-12 and A-14 were given by petitioner Rosenblum at the same time and were put down by the Government witness Richardson, the accountant, and Government's Exhibit A-13 was prepared by Richardson in his own handwriting, and all three of these exhibits were part and parcel of the same transaction; the Government cannot introduce into the evidence Exhibit A-12, and rely thereon to show gross receipts, and at the same time identify for the Record and then "ignore" its Exhibits A-13 and A-14 which show the expenses of petitioners. The rule as applicable to our cases is succinctly stated by Professor Wigmore, Wigmore on Evidence, Second Edition, as follows:

> "The opponent, against whom a part of an utterance has been put in, may, in his turn, complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance * * * there is and could be no difference of opinion as to the *opponent's right*, if a part only has been put in, himself *to put in the remainder* * * *. This right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction." Sec. 2113.
>
> "The principle as applied to writings permits the whole of the same document to be put in." Sec. 2116.
>
> "The same principle would apply *to another writing*, not expressly referred to, but *necessary* by the nature of the documents to a proper understanding of the one offered * * *." Sec. 2104.

Question Three.

On page 2 of Government's brief, it states a question as number three of the questions presented, "Whether the evidence was sufficient to sustain the conviction." Such statement does not approach the Question Three as presented by petitioners on page 15 of their Petition.

By its statement of the question and its argument there-

on, the Government begs Question Three as presented by petitioners in their Petition on page 15, summarized on pages 28 and 29 of their brief in support of said Petition, that the receipt in evidence of the hearsay statements of the several defendants, and their amended tax returns, all made long after the commission of all acts claimed by the Government to constitute the offenses charged, was prejudicial to the individual rights of each defendant in the substantive charges. The reversal by the Court of Appeals on the conspiracy indictments automatically rules out this mass of incompetent evidence which was admitted into the record solely because of the claim of conspiracy in the consolidated trial, and such evidence was not admissible on any theory as to either the substantive or the conspiracy charges.

The admission of the evidence of witnesses Ackerman, Hicks, Palffy and Siemion was clearly hearsay as to Weiss, and very prejudicial as to him.

The admission of Government's Exhibit X-1, transcript of statement of Mr. Rosenblum of March 21, 1944, was prejudicial as to Weiss and Stryk, and it was hearsay as to them.

Consequently, the cases cited by the Government on page 19 of its brief are not in point upon Question Three as presented by the petitioners.

The Government was and is estopped by its stipulation that the moneys alleged by it to have been omitted from the tax returns were "gross receipts", taken in by Rosenblum, from the sale of liquor, and it cannot now claim that such money was profit received by the Gary Wine and Liquor Corporation, as it has attempted to do on page 6 of its brief; and it is likewise estopped from using any part of the several extrajudicial statements of the petitioners which were not in conformity with said stipulation identified as Government's Exhibit Z.

Question Four.

The Government did not respond to that part of question four of petitioners (Pet. 15), nor to the reasons assigned for the granting of the writ on account thereof as set out on pages 22 and 23 of the petition, which, in paragraph A, page 22 of the petition, particularly points out that Rules 8 and 13, Federal Rules of Criminal Procedure, make the allegations on the face of the indictments the test by which consolidation shall be determined, and cite *McElroy* v. *United States,* 164 U. S. 67, *Castellini* v. *United States,* 64 F. 2d 636, Sixth Circuit, and *DeLuca* v. *United States,* 299 F. 741, Second Circuit, in support of this contention; this part of question four presents an important one of federal criminal procedure, and the decision of the Seventh Circuit in the instant cases is in conflict with the cases which we have cited.

The cases cited by the Government on page 20 of its brief, do not apply to the point which petitioners thus presented.

Paragraph B of question four (Pet. 22-23, 29) particularly shows how the petitioners were substantially prejudiced by the wrongful consolidation; the mass of hearsay statements and oral evidence which went in *solely* on the conspiracy charge was wrongfully considered by the trial court, and was largely the basis of his finding of guilt on the substantive indictments. Such result could not have happened except for the illegal consolidation; the reversal of the conviction on the conspiracy charge, *ipso facto* took out of the record this mass of incompetent, erroneously received, and prejudicially considered evidence, and it is evident that the judgment of the trial court was substantially swayed by such error, and it affirmatively appears that the substantial rights of the petitioners were prejudicially affected.

That the trial court was confused by the consolidation,

is partially evidenced by the fact that on page 279 of the Record he said he could not see how the defendants could be prejudiced by the Government's labeling the income as "dividends" or "profits of a joint venture", instead of merely labeling it as "other income", and that he was of the opinion that profits from a joint venture are not inaptly called dividends; this line of reasoning is inexplicable, as applied to the facts in our cases, as the Government and petitioners stipulated that the moneys claimed by the Government to have been omitted from the individual tax returns of the several defendants "were *gross* amounts received in cash by Louis H. Rosenblum in the transactions from purchasers" of liquor. (Government's Exhibit Z.) It is impossible to determine why the trial court was in confusion as to the nature of the moneys received, as the parties had stipulated that they were *gross receipts* to Rosenblum from the sale of liquor.

The procedure at the trial was so prejudicial that the Court of Appeals in reversing the conspiracy charge said the trial court could not differentiate between the proof relative to the various charges against the several petitioners (R. 399); he could not prevent the prejudice resulting to the substantial rights of the several petitioners which flowed from the wrongful admission of hearsay statements in the consolidated trials (R. 401).

Such prejudicial error having been shown, and no denial thereof or explanation therefor having been made by the Government, it clearly follows that the writ should be granted and the judgment of conviction reversed. *Fiswick* v. *United States,* 329 U. S. 211; *Kotteakos* v. *United States,* 328 U. S. 750.

As to "Statement" of Respondent.

The footnote on page 6 of the Government's brief says that petitioners failed to provide any of the exhibits admitted at the trial. On October 10, 1949, Hon. J. Earl Major, Chief Judge of the United States Court of Appeals for the Seventh Circuit, on application of counsel for the petitioners, "ordered that the clerk of this Court certify and transmit the original exhibits in this cause (9718-9721, 9719-9723, 9720-9722) to the Supreme Court of the United States". Petitioners had assumed this order had been complied with.

The Government, in relying upon the statement of facts in the Opinion of the Court of Appeals, has erroneously relied upon the references by Circuit Judge Kerner to the facts beginning on R. 392 and continuing through R. 397. These facts as recited by Judge Kerner were challenged by petitioners in their Petition for Rehearing in the Court of Appeals, with which challenge the Government did not take issue in its response in that Court. Judge Kerner's reference to the facts and the recitals and excerpts in that Opinion—now relied upon almost exclusively by the Government in its Brief in Opposition—are by Judge Kerner in discussion of the *conspiracy* charge, which subject he begins on R. 389 and continues through R. 397; almost every recital of fact therein comes from those witnesses or documents which were admitted *solely* upon the charge of conspiracy, the convictions on which charge were reversed by the Court of Appeals.

With the reversal of the conspiracy convictions every bit of evidence received on that charge went out of the Record. We think Circuit Judge Kerner was writing a dissenting opinion starting with the middle of Page 389 and continuing through Page 397 of the Record, and his recitals and excerpts quoted from were to sustain his position that the convictions on the conspiracy charge were proper, *but in doing so* he relied upon and recited almost exclusively from the very testimony which the majority of the Court of Appeals held was improperly received and considered

by the trial court, and one of the grounds, amongst others, upon which the conspiracy convictions were reversed.

It being apparent that the Government, in its Brief in Opposition herein, has relied upon such erroneous evidence, all of which went out of the Record with the reversal of the conspiracy charge, makes it unnecessary to further consider the "Statement" of the Government appearing on pages 4 to 13, inclusive, and the evidentiary matter discussed on pages 16 to 19 inclusive of its brief, in connection with the application for the writ.

By not further discussing the factual matters contained in such Statement of the Government, petitioners do not intend to admit that the Government has correctly stated such facts, but it is their position that a further consideration of such factual statements are not properly a part of the proceedings on petition for the writ, but should be treated by them fully on Review if the Petition for a Writ of Certiorari is granted.

Conclusion.

For all of the foregoing reasons, as well as those stated in the petition and original brief in support thereof, it is respectfully urged that the application of each petitioner for a writ of certiorari should be granted.

Dated: Indianapolis, Indiana,
November 17, 1949.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

November 4, 1949.

No. 9895.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* HILLEN J. FENWICK, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Southern District of Indiana, Indianapolis Division.

REVERSING AN UNREPORTED DECISION OF THE DISTRICT COURT.

[*Appeal from a Conviction of Fraud*]

Before MAJOR, Chief Judge, KERNER and LINDLEY, Circuit Judges.

LINDLEY, Circuit Judge: Defendant appeals from a judgment upon a verdict of a jury finding him guilty of wilfully attempting to defeat and evade a part of the income and victory tax due from him for the years 1943 and 1944.

Count 1 of the indictment charged that defendant, for 1943, made a false and fraudulent return in that he reported an income tax net income for the calendar year, of

$4,940.88, a victory tax net income of $6,040.94 and income and victory tax due of $907.50, whereas each of said incomes for the calendar year was $10,709.04, upon which he owed a total tax of $2,737.62. Count 2 charged that he falsely and fraudulently stated that his net income for 1944 was $5,677.58 and the tax due thereon $1,171.50, whereas his net income for the year was $22,198.87, upon which he owed a tax of $8,486.94.

[*Contentions of Parties*]

Upon appeal, defendant contends that the evidence was insufficient to establish his guilt, in that there was no proof of undisclosed source of income or of unreported taxable income from disclosed sources and no proof of defendant's net worth in 1943 and, therefore, no basis for establishment of increased net worth or expenditures in excess of reported income and, further, that, under the facts of the case, the increased net worth and expenditures method of proof is not properly applicable. The government insists that it has proved that defendant wilfully evaded payment of tax in each year by evidence that in each year defendant's net worth increased in an amount greater than his reported income and by evidence of expenditures in excess, as it says, of defendant's disclosed incomes.

[*No Evidence that Income Was Erroneously Stated*]

The tax return for each year was prepared by a deputy collector in accord with information supplied by defendant. At the trial, the government offered no evidence that the income reported was erroneously stated; nor did it question any of the deductions made by defendant. On the contrary, it relied entirely upon what it contends is sufficient evidence to establish an increase in net worth during each of these years in excess of the tax reported and expenditures in excess of reported income.

In such a situation we must keep in mind that the conviction can not stand unless there is proof of the *corpus delecti*, existence of which can not be presumed or established by an extrajudicial admission. The government must, by competent evidence, prove beyond reasonable doubt that the crime charged has actually been committed. *Pines* v. *United States*, Cir. 8, 123 Fed. (2d) 825, 829; *Forte* v. *United States*, CA-DC, 94 Fed. (2d) 236, 243; *Gordnier* v. *United States*, Cir. 9, 261 Fed. 910, 912; *United States* v. *Chapman*, 168 Fed. (2d) 997 at 1001. In the latter case we said: "Appellant contends that, 'In a net worth case, the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict.' We fully agree with his statement of the law." In other words to justify the conviction, there must be proof beyond reasonable doubt and exclusive of any express or implied extrajudicial admission by defendant, that defendant evaded some income tax. *Gleckman* v. *United States*, Cir. 8, 80 Fed. (2d) 394, 399; *United States* v. *Miro*, Cir. 2, 60 Fed. (2d) 58, 61; *O'Brien* v. *United States*, Cir. 7, 51 Fed. (2d) 193, 196. Inasmuch as there is no direct proof that defendant received income which he did not report, we must test the validity of his conviction by the rules enunciated in the cases cited to determine whether there is such proof of increase in net worth, irrespective of defendant's implied admissions out of court, as to justify a finding of guilt. Such proof, circumstantial in character, in view of the principles announced, must be such as will exclude every reasonable hypothesis except that of guilt. Evidence of mere probability of guilt, of course, is not sufficient. Whether the proof meets these requirements necessitates some discussion of the evidence.

[*The Facts*]

From 1919 to 1947 defendant owned and operated a drugstore in Evansville, Indiana, and acquired from time to time pieces of real estate in the same city and a farm in an adjoining county. During 1943 and 1944, as well as for sometime previously thereto, he owned a number of coin-operated music boxes and amusement machines, which he placed in various restaurants and taverns for operation, the tenant and the owner dividing the net proceeds from the machines equally. His store, real estate and automatic machines afforded, according to the evidence, his only sources of income. Apparently he was a careless man, in so far as keeping records was concerned, as he kept no formal books of account but only invoices, memoranda, bills and checks. It was from such basic material and his own statements that the tax returns for 1943 and 1944 were prepared by the deputy collector. His return for 1943 showed that he had gross receipts of $55,280.21 and, after undisputed deductions, a net taxable income of $6,198.44 and a tax of $1,010.39 (including the unforgiven portion of 1942), which was paid. As we have indicated, there is no proof that any of the information furnished or any of the amounts reported was inaccurate or false. In fact the record is devoid of any direct evidence that defendant had any taxable income that he did not report.

Upon the theory that his worth had increased in each of the years, the government assumed that defendant's net worth on January 1, 1943 was $50,829.06. An experienced auditor in the employment of the government testified that this net worth, at the end of 1943, was $62,200.80. He assumed that the increase, $11,371.74, was taxable income received by defendant in 1943. His computation fixed defendant's net worth at the end of 1944 at $85,989.67, resulting in an increase in net worth of $22,228.87, which the witness said was taxable income received by defend-

ant in 1944. Upon the hypothesis that these computations were correct, a technical advisor of the Revenue Department computed defendant's tax for 1943 at $2,538.83 of which he had paid $1,010.39 and, in 1944, at $8,504.64 of which he had paid $1,171.50.

The weakness of the government's position, stressed by defendant, is the uncertainty of the propriety of the finding of defendant's net worth at the beginning of 1943. Of course, before the increased net worth method of proof is effective, the net worth of the taxpayer at the beginning of the tax year must be clearly and accurately established by competent evidence. *Bryan* v. *United States,* Cir. 5, 175 Fed. (2d) 223; *United Stotes* v. *Chapman,* Cir. 7, 168 Fed. (2d) 997, 1001; *United States* v. *Skidmore,* Cir. 7, 123 Fed. (2d) 604, 608. By this rule we must test the sufficiency of the evidence offered by the government to establish defendant's net worth at the beginning of 1943.

[*Insufficient Evidence Offered to Establish Taxpayer's Net Worth*]

The agent of the Revenue Department testified that he examined defendant's cancelled checks, bank statements and miscellaneous memoranda covering 1943 and 1944 and from them secured the information upon which he based his computation. He admitted that he found no discrepancy in the amounts received by defendants as income and the amounts returned. The government offered no direct testimony of unreported income items or of any undisclosed source of income.

The parties seem to be in no disagreement as to valuation of certain property owned by defendant, but there is no proof that the property admittedly owned by him at the beginning of 1943 constituted all assets he had at that date. There is no proof that he had not accumulated cash, or assets of other character over the 25 years during which

he had been engaged in business. The agent testified that defendant said that he received no gifts by inheritance in the five years 1940 to 1944 inclusive, and that he had no bank account, stocks or bonds or securities except those submitted. But defendant did tell the agent that he had been in business for 25 years and that in the five year period mentioned, he owned United States Savings bonds which he had cashed. There is no proof as to the amount of bonds defendant owned at the end of 1942, or of when they were cashed or whether they were cashed in 1943 and 1944. The agent testified that defendant had certain corporate stock but the prosecution offered no proof as to the amount owned by defendant in 1942 or whether any part or all of it was sold in 1943 or in 1944. The agent further testified that defendant said he had a $10,000 life insurance policy, but there is no proof of its value at the end of 1942 or as to whether it was surrendered or cashed in 1943 and 1944. The agent said on cross-examination that he had made no inquiry of defendant as to whether he had cash on hand accumulated from earnings from his business in the years prior thereto. When counsel for defendant objected that the agent merely assumed that the assets he had enumerated were the defendant's only assets at the beginning of 1943, the United States Attorney remarked that there might have been other assets. In other words, the evidence falls far short of proof that the property which the government agents assumed constituted all of defendant's net worth at the beginning of 1943, was in fact all of the property then owned by him. And, in determining net worth and expenditures, the government took no account of unquestioned deductions for depreciation and depletion, amounting, in 1943, to $7,255.63 and, in 1944 to $9,389.44 and accumulated over the years to $34,464.41. These deductions, though authorized by law, were in their essence money which defendant might legiti-

mately and advantageously have expended for new assets of other character, thus increasing his net worth from a legitimate source.

As we have said, when the government relies upon the circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion it must produce evidence that excludes all possible available sources of taxable income from which the increased net worth and the excess expenditures could have been derived. Thus in *Bryan* v. *United States,* Cir. 5, 175 Fed. (2d) 223, the court said: "The net worth-expenditures method of establishing net income, sought to be applied in this case, is effective only if the computations of net worth at the beginning and at the end of the questioned periods can reasonably be accepted as accurate. Since * * * no claim of evasion is based upon the deductions from gross income reported by the defendant, and since there is no evidence that the gross expenditures by the defendant in any year were made entirely from gross income of the business operations in such year, it was essential for the government to present evidence that excluded, or tended to exclude, all other available sources from which the additional funds expended could have been derived. If the defendant correctly reported his gross income, then a very substantial part of the expenditures was obliged to have been made from funds other than such current income and from sources not covered by the returns or the records of the defendant or included by the government's computation of net worth. * * * the Government must rely almost entirely upon circumstantial evidence, that is to say, upon the circumstance of the expenditure of considerably more money in the years in question than the defendant took in. * * * The evidence, being circumstantial, must exclude every reasonable hypothesis other than the guilt of the defendant. * * * the case should not

have been submitted to the jury, since it did not exclude the hypothesis that the funds used in making some of the expenditures might have been from sources other than current business income." This is in accord with the decision of this court in *United States* v. *Chapman,* Cir. 7, 168 Fed. (2d) 997, 1001.

[*Conclusion*]

Remembering that the government has the burden of proof in a criminal case, that the burden never shifts to defendant, that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt, it necessarily follows that, when the government relies upon circumstances of increased net worth and expenditures in excess of reported income to establish income tax evasion, the basic net worth must be established. The defendant is not compelled to take the witness stand; he is not compelled to make proof that he is innocent, but he must be proved guilty by the evidence beyond all reasonable doubt, and where there is uncertainty as to whether all the assets of defendant are included in the government's computation of net worth, it follows that its computations can not be relied on. Essential proof of no other assets is the cornerstone of the evidence of the government; that cornerstone being faulty, the whole edifice is so weakened as to be undependable as proof of guilt beyond all reasonable doubt.

The judgment is Reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 368

LOUIS H. ROSENBLUM, PETITIONER

v.

UNITED STATES OF AMERICA

No. 369

MAX STRYK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 370

JACOB WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 275-282) was not reported. The opinion of the Court of Appeals (R. 386-402) is reported in 176 F. 2d 321.

JURISDICTION

The judgments of the Court of Appeals were entered on June 13, 1949. (R. 403, 404, 405.) Petitions for rehearing were denied August 24, 1949. (R. 406.) The time for filing a petition for a writ of certiorari was extended to October 7, 1949. (R. 412.) The petition for a writ of certiorari was filed on October 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. See also Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether there was a fatal variance between the charge contained in the indictment and the proof.

2. Whether there was competent evidence in proof of net income.

3. Whether the evidence was sufficient to sustain the conviction.

4. Whether the petitioners were prejudiced by consolidation of the indictments for trial.

STATUTE AND RULES INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any

person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

RULE 8. JOINDER OF OFFENSES AND OF DEFENDANTS.

* * *

(b) JOINDER OF DEFENDANTS. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

RULE 13. TRIAL TOGETHER OF INDICTMENTS OR INFORMATIONS.

The court may order two or more indictments or informations or both to be tried to-

gether if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

STATEMENT

Petitioners were charged in separate indictments, returned in the Southern District of Indiana, with having wilfully attempted to evade and defeat their individual income and victory taxes for the calendar year 1943 (R. 3, 5, 7), and were also charged with having conspired each with the other to attempt to defeat and evade large parts of the income and victory taxes due and owing by each of them to the United States for the calendar year 1943 (R. 8). The indictment returned against the petitioner Rosenblum alleged that he had understated his income in the amount of $173,738.32 and his tax liability in the amount of $139,269.41. (R. 3.) The petitioner Weiss was alleged to have understated his income in the amount of $120,967.82 and his tax liability in the amount of $100,651.30. (R. 5.) With respect to the petitioner Stryk, it was alleged that his income had been understated in the amount of $173,738.33 and his tax liability in the amount of $139,237.54. (R. 7.) In each of the indictments, gross income was itemized, and among these items were amounts

designated dividends and capital gain. (R., 5, 7.)[1]

In answer to questions raised by petitioners' motions for bills of particulars, the Government stated seven months before the trial (R. 52-56, 72) that it did not charge and would make no effort to prove upon the trial that the amount listed as dividends under the heading of "gross income" in the indictment represented corporate dividends; that the Government's position was rather that this money represented dividends or a division of money received by the petitioners from a joint venture or joint enterprise in which the petitioners were participants; and, further, that the Government would make no effort to prove that petitioners realized a capital gain in the amount alleged in the indictments, or in any other amount.

Over petitioners' objection, the four indictments were consolidated for trial. (R. 63.) Trial by jury was duly waived (R. 73), and, after a trial by the court, each of the petitioners was adjudged guilty as charged (R. 295-299). Each of the petitioners

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[1] The following figures relating to gross income were alleged:

	Rosenblum	Weiss	Stryk
Salary	$ 34,562.50	$ 5,000.00	$ 34,381.00
Dividends	145,022.72	120,967.82	145,022.74
Interest on bonds, notes, etc.	.....	2,286.27	225.00
Interest on Government obligations	285.86	.....	285.86
Capital gain	28,715.60	.....	28,715.59
Net profit from profession	.....	21,642.78	.....
Other income	4,109.97	3,967.81	4,778.80
Total income	$212,696.65	$153,864.68	$213,408.99

was thereupon sentenced to a term of imprisonment for three years and to pay a fine of $10,000 and one-third of the costs of prosecution on the substantive charges. (R. 295, 296, 297.) Each petitioner was also sentenced to a term of imprisonment for two years and to pay a fine of $10,000 and one-third of the costs of prosecution on the conspiracy charge, the sentence to begin at the expiration of the sentence imposed on the substantive charges. (R. 298-299.)

The evidence showed that during the year 1943 petitioners Stryk and Rosenblum were president and secretary, respectively, of Gary Wine and Liquor Corporation of Indiana (R. 92), and owners of all of the stock (R. 392).[2] Petitioner Weiss was its attorney. (R. 392.) Petitioners stipulated (R. 147) that Gary Wine and Liquor Corporation sold whiskey distributed by James B. Beam Company (R. 150), that during 1943 it sold 210 barrels and 6,584 cases of Beam whiskey for a total invoiced price of $159,826, and that in addition it received in over-ceiling payments cash totaling $99,799 (R. 393.) In addition to the over-ceiling payments so stipulated, it was proved that petitioners Rosenblum and Stryk received cash over-

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[2] For inclusion in the transcript of record, petitioners failed to provide any of the exhibits admitted in evidence at the trial. (R. 408-409.) It has therefore been necessary to rely upon the statement of facts contained in the opinion of the Court of Appeals with respect to the documentary evidence.

ceiling payments in the amount of $136,293 from Myers C. Ackerman and Alex B. Palffy. (R. 153, 154, 160.)

In June, 1943, petitioner Weiss entered into negotiations for the purchase of the capital stock of Judge and Dolph, Ltd., of Wisconsin. (R. 167.) This corporation was engaged in the wholesale liquor business. (R. 165.) At the time of these negotiations, Judge and Dolph had on hand approximately 2,400 barrels and 5,000 cases of whiskey. (R. 165.) A purchase price of $420,000 was finally agreed upon (R. 165-166), and petitioner Weiss paid $50,000 for a thirty-day option (R. 125), which payment was to be applied on the purchase price if the option were taken up (R. 167-168). The $50,000 paid by Weiss on the option was furnished by Rosenblum and Stryk from the proceeds of their over-ceiling sales of Beam whiskey. (R. 214, 215, 394.) Immediately thereafter, Staple, Inc., a dummy holding corporation (R. 136-137), was organized, with petitioner Weiss and his wife as the stockholders (R. 131), and the option obtained by Weiss was assigned to this corporation (R. 126). During further negotiations, attended by petitioners Rosenblum, Stryk, and Weiss, an agreement was entered into, whereby Staple, Inc., purchased all of the capital stock of Judge and Dolph, Ltd., for the sum of $420,000 and agreed to pay an obligation of $140,000 owing to Judge and Dolph of Illinois. (R. 163-164.) The

total purchase price was therefore $560,000. (R. 138.) Of the balance of $370,000 that was owing on the Judge and Dolph stock (R. 125), $334,000 was paid by Rosenblum and Stryk from funds realized through advance deposits for the purchase of this whiskey, and the remaining $36,000 was loaned by Weiss (R. 128.) These funds were advanced to Staple, Inc., under the guise of a loan from P & M Liquor Corporation. (R. 127-128.) The $140,000 obligation of Judge and Dolph was subsequently paid off by Weiss. (R. 137.) Rosenblum and Stryk gave Weiss $75,000 in Government bonds to secure a loan. (R. 396.) With these bonds as security, Weiss borrowed $75,000. (R. 216.) The balance was obtained through another loan of $65,000. (R. 138.) Subsequently, the name of Judge and Dolph, Ltd., was changed to Milwaukee Liquor Corporation. (R. 143.) When this obligation was discharged, petitioner Weiss received $126,000 worth of additional shares in Milwaukee Liquor Corporation, valued at $420 per share. (R. 143.) Milwaukee Liquor Corporation was still in business in 1945, with petitioner Weiss as its chairman. (R. 396.)

For the purpose of marketing this whiskey, petitioner Rosenblum induced one Sidney Prosterman and one Leo Mitteldorf to organize P & M Liquor Corporation. (R. 394.) It was agreed that P & M would sell at OPA ceiling prices whiskey furnished by Rosenblum, and that Prosterman

and Mitteldorf would be paid a commission of seventy-five cents per case on all sales made. (R. 176-180.) Prosterman actually made no sales of whiskey himself, but referred customers to Rosenblum. (R. 186.) The initial capital of $10,000 (R. 184) with which P & M Liquor Corporation started operations was furnished by petitioner Stryk (R. 185). P & M then entered into an agreement with Weiss and Staple, Inc., which provided for reimbursement for the purchase price of the Judge and Dolph stock and for the bottling and sale of the whiskey. (R. 126, 172, 394.) Under this agreement, P & M bought for $50,000 the bulk whiskey which was carried at $82,000 on the books of Judge and Dolph. (R. 133-135.)

At the trial it was stipulated that 25,990 cases and forty-five barrels of whiskey acquired from Judge and Dolph were sold for a total invoice price of $529,249, and that Rosenblum had received in cash over-ceiling payments which totaled $313,-036. (R. 171, 394.)

Taxpayers' accountant was called as a witness by the Government. (R. 93.) In the course of his examination he produced two schedules, which were identified as Government exhibits A-13 and A-14 and which purported to reflect expenses not claimed in the return. (R. 102, 103.) The information contained in these schedules was furnished by petitioner Rosenblum. (R. 102-103.) These exhibits were admitted into evidence, over the ob-

jection of Government counsel. (R. 121-122, 397.)

The money which P & M used to pay for this whiskey was furnished by Rosenblum from whiskey sales. (R. 191-192.) The income and declared value excess-profits tax return filed on behalf of P & M for 1943 reflected cost of whiskey in the amount of $848,961.02 and gross income of $974,-279.63. (R. 121.)

The corporate records did not reflect any of the over-ceiling receipts, and such receipts were not included in the corporate returns or in the individual returns filed by the petitioners for the year 1943. (R. 97, 121, 147.) Nor did petitioners disclose to the accountant who made out their returns the receipt of these over-ceiling payments. (R. 94, 95, 96, 123.)

In March, 1944, all three petitioners were interviewed by agents of the Alcohol Tax Unit of the Bureau of Internal Revenue, in connection with whiskey sales made to Ackerman. (R. 243.) At this interview, Rosenblum denied that he had received any side payments from Ackerman. (R. 395.)

In May and June of 1945, Weiss, Rosenblum, and Stryk all appeared before the Intelligence Unit of the Bureau of Internal Revenue and testified concerning their whiskey dealings. (R. 231.) Weiss described his close relationship with Rosenblum and Stryk in connection with Gary Wine and Liquor Corporation. (R. 395.) He stated that at their request he had participated in negotiations

which led to the purchase of Judge and Dolph, Ltd., of Wisconsin; that in working out the details of the contract there had been discussion that "there must be 'justification' for this whole picture in case inquiry should be directed against this transaction by the authorities * * *. We had agreed * * * that we would pay that price which eventually would be computed out, but that any dollars and cents * * * actually was to be reduced or increased to an even dollar figure so that the tracing would be difficult. * * * " (R. 395.)

Subsequently, Weiss stated that the "total price paid for the 116,509.83 gallons of whiskey paid by us to Judge and Dolph of Illinois [was] $403,869.62 * * * in addition to which we were to purchase the stock of the corporation for its net worth value which subsequently developed to be $30,068.88, and we agreed to pay off $140,000 * * * owed by Judge and Dolph of Wisconsin to Judge and Dolph of Illinois." (R. 395-396.)

Weiss further stated that, in addition to the $50,000 which Rosenblum and Stryk had handed him to pay for the option, they had given him $75,000 in federal bonds to secure a loan to use in paying the $140,000. "The money so received from Mr. Rosenblum and Mr. Stryk totalled $160,000." (R. 396.)

In these same interviews, Rosenblum admitted the receipt of $363,000 in cash in excess of the P & M invoice prices which amounted to $974,279. (R. 396.) This $363,000 he said was paid over to

Staple, Inc., to be used in payment of the whiskey and capital stock of Judge and Dolph, Ltd., of Wisconsin, and in reduction of the debt. (R. 396.) He further stated that, although he did not represent P & M in any way and had nothing to do with its operation or any share in its profits, he could guarantee delivery by it of any orders he took for the sale of liquor—that there was no agreement as to that, but an understanding. (R. 396.)

At the same series of interviews, Stryk stated that they had intended to report the income for tax purposes, but that "it became such a hot potato we didn't know how to. We intended to do it this year (1945). At that time we didn't know how to work it out." In case of a sale by Milwaukee Liquor Corporation, he "got a third of it." He denied ever handling any of the over-ceiling cash, but admitted putting packages given him by Rosenblum which he knew contained money into his safety deposit box. (R. 396.)

At the time of these interviews, Weiss was living in Milwaukee and gave as his occupation "chairman of Milwaukee Liquor Corporation." (This was the successor to Judge and Dolph, Ltd., of Wisconsin, which was thus still operating as a wholesale wine and liquor business.) (R. 396.)

After these interviews were had, petitioners, on August 11, 1945, filed a 1943 partnership return of income in the names of L. H. Rosenblum, Max Stryk, and Jacob Weiss. This return disclosed ordinary net income of $142,279.18. (R. 86.) At-

tached to the return was an explanation of the filing, which stated that it was to make clear that the transactions by Staple, Inc., were in fact those of Rosenblum, Stryk, and Weiss. (R. 396-397.) According to the evidence adduced by the Government, however, gross receipts from these black-market sales amounted to $586,178.97, against which were allowed expenses of $25,698.99. (R. 246.) This resulted in a joint-venture net income of $560,479.98 (R. 246), or $418,200.80 in excess of that reported in the joint-venture return. At the same time, Rosenblum, Stryk, and Weiss filed amended individual income-and-victory tax returns for the year 1943. (R. 86.) In these amended returns Rosenblum reported a taxable income of $86,384.72 and a tax liability of $55,426.16; Stryk reported a net income of $87,097.55 and a tax liability of $55,660.45; and Weiss reported a net income of $75,323.26 and a tax liability of $43,752. (R. 86.)

On appeal, the judgment of conviction was affirmed by the Court of Appeals for the Seventh Circuit with respect to the substantive charges, and was reversed as to the conspiracy charge. (R. 398, 403, 404, 405.)

ARGUMENT

I

Petitioners contend that they were convicted of a charge for which they were not indicted (Pet. 14), because the indictments upon which they were

tried alleged the receipt of "dividends" and the proof showed a failure to report as income profits from a joint venture (Pet. 16). In effect, petitioners argue that there was a fatal variance between the charge and the proof. The inquiry is, of course, not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. *Berger* v. *United States,* 295 U. S. 78, 82. The indictments here charge the petitioners with having wilfully attempted to evade and defeat income and victory taxes due and owing by them for the calendar year 1943, in violation of Section 145(b), Internal Revenue Code, and alleged as the means the filing of false and fraudulent returns. (R. 3, 5, 7.) The indictments charged the offenses substantially in the language of the statute, and this has been held to be sufficient. *Capone* v. *United States,* 56 F. 2d 927 (C.A. 7th), certiorari denied, 286 U. S. 553; *Gleckman* v. *United States,* 80 F. 2d 394 (C.A. 8th), certiorari denied, 297 U. S. 709; *Tinkoff* v. *United States,* 86 F. 2d 868 (C. A. 7th), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715.

The purpose of an indictment is to apprise the defendant of the offense with which he is charged and to stand as a bar to any further prosecution for the same offense. *Wilson* v. *United States,* 158 F. 2d 659 (C.A. 5th), certiorari denied, 330 U. S. 850. Petitioners' complaint is directed, not at the sufficiency of the indictment, but merely to

the allegation describing the nature of the income which they failed to report. Had this allegation which itemized gross income been eliminated, the indictment would still have sufficiently charged a violation of Section 145(b), Internal Revenue Code. *Cave* v. *United States,* 159 F. 2d 464 (C.A. 8th), certiorari denied, 331 U. S. 847. The allegations with respect to gross income were in effect surplusage. *Hall* v. *United States,* 168 U. S. 632; *Glover* v. *United States,* 125 F. 2d 291 (C.A. 5th), certiorari denied, 316 U. S. 690; *Leche* v. *United States,* 118 F. 2d 246 (C.A. 5th), certiorari denied, 314 U. S. 617, rehearing denied, 314 U. S. 712. Had the indictment alleged a failure to report *corporate* dividends, there might be some basis for petitioners' argument. The indictment, however, merely alleges dividends, the generally accepted definition of which is a division of profits. For petitioners to say that they were taken by surprise is clearly not supported by the record. The Government, in its answer to petitioners' motions for bills of particulars, explicitly stated that the term "dividends" in the indictment was used in the sense of a division of profits from a joint venture, and not in the sense of a distribution of corporate profits. (R. 53-56.) These answers were filed November 21, 1947, whereas the trial did not start until June 22, 1948, approximately seven months later. (R. 73.) In the light of these facts of record, petitioners' contention that they were

misled by the use of the word "dividend" evaporates completely.

Petitioners' fear that the indictments in question do not protect them from another prosecution for the same offense is equally baseless. Petitioners were convicted of wilfully attempting to evade and defeat their individual income and victory taxes for the calendar year 1943. Since the gist of the offense is the attempt to evade and defeat the tax, the means employed were a matter of evidence and not a necessary allegation in the indictment. Hence it would be immaterial whether the tax were due from unreported corporate dividends or from an unreported share of profits from a joint venture. *United States* v. *Miro,* 60 F. 2d 58 (C.A. 2d); *United States* v. *Simmons,* 96 U. S. 360. Clearly, petitioners were not prejudiced. Any error, defect, irregularity, or variance which does not affect substantial rights is disregarded. Rule 52, Federal Rules of Criminal Procedure for the District Courts of the United States. See also *Ragen* v. *United States,* 314 U. S. 513, 526.

II

Petitioners argue that the Government failed to prove that they had any net income for the year 1943. (Pet. 28.) Petitioners stipulated the receipt by Rosenblum and Stryk of $99,799 in cash side payments from the sale of Beam whiskey sold through Gary Wine and Liquor Corporation, and $313,036 by Rosenblum from the sale of Judge

and Dolph whiskey sold through P & M Liquor Corporation. (R. 393, 394.) By direct evidence, the Government proved additional black-market receipts of $136,293 on the sale of Beam whiskey. (R. 394-395.) Petitioners Rosenblum and Stryk were in control of Gary Wine and Liquor Corporation, and petitioner Weiss was its attorney. (R. 392.) Weiss was instrumental in carrying on negotiations which led to the acquisition and sale of the Judge and Dolph whiskey. (R. 167, 168, 207, 209.) In their interviews before the representatives of the Bureau of Internal Revenue, in the joint-venture partnership return, and in the amended individual returns filed in 1945, petitioners admitted their interest in the black-market proceeds from these ventures. (R. 392, 395-396.) It is clear that petitioners believed that they had realized income from these black-market transactions and that they were under an obligation to report such income and to pay the taxes due thereon.

The Government did not charge these petitioners with failing to pay a tax on gross receipts. All expenses which the investigating agents were able to find were allowed in determining net income. (R. 246.) The only evidence offered by defendants in proof of any additional costs was Government exhibits A-13 and A-14. (R. 102, 103.) These exhibits were admitted into evidence over objection of Government counsel. (R. 121, 122.) They were not substantiated in any way and were

at best a self-serving declaration on the part of petitioner Rosenblum. (R. 397.) The Government was entitled to rely upon the costs reflected in petitioners' returns, and, if they had additional costs, it was incumbent upon them to prove it. *Barrow* v. *United States,* 171 F. 2d 286 (C.A. 5th). Even if Government exhibits A-13 and A-14 had constituted competent evidence, the Government was not bound by this evidence, and the trial court was warranted in ignoring it. *United States* v. *Palese,* 133 F. 2d 600 (C.A. 3d); *United States* v. *Reginelli,* 133 F. 2d 595 (C.A. 3d), certiorari denied, 318 U. S. 783.

In the absence of competent evidence to the contrary, the Government was entitled to rely upon the costs claimed in the returns and reflected in the corporate records. *Barrow* v. *United States, supra.*

III

The evidence was sufficient to support the trial court's finding of guilt with respect to the substantive charges. Petitioners Rosenblum and Stryk were in control of Gary Wine and Liquor Corporation, and petitioner Weiss was its attorney. (R. 392.) By stipulation and direct evidence, the receipt by Rosenblum and Stryk of substantial black-market payments on the sale of Beam whiskey was established. (R. 393.) Large sums of money were furnished petitioner Weiss from this source for his use in acquiring the stock of Judge and Dolph of Wisconsin. (R. 124-140.) Weiss

was in control of Staple, Inc., which held the stock of Judge and Dolph, Ltd., of Wisconsin, and he arranged for the sale of the Judge and Dolph whiskey to P & M Liquor Corporation. (R. 206-208.) Weiss also received stock worth at least $126,000 in the Milwaukee Liquor Corporation. (R. 143.) This corporation was still in business in 1945. (R. 206, 396). This evidence and the inferences which could be drawn therefrom proved the *corpus delicti,* and provided an adequate foundation for the introduction into evidence of the subsequent admissions. *Wiggins* v. *United States,* 64 F. 2d 950 (C.A. 9th).

The amended individual returns were based on the partnership return. (R. 86.) These amended returns were properly admitted into evidence as admissions in proof of the substantive charges. *Emmich* v. *United States,* 298 Fed. 5 (C.A. 6th); *Heindel* v. *United States,* 150 F. 2d 493 (C.A. 6th). Under the same theory, the statements made by petitioners to representatives of the Bureau of Internal Revenue were admissible against the petitioner who made them.

When trial is by the court, intervention by the appellate court with respect to the sufficiency of the evidence is warranted only if it is shown that the trial court's findings are wholly unsupported by the evidence. *Blodgett* v. *United States,* 161 F. 2d 47 (C.A. 8th); *Cannon* v. *United States,* 166 F. 2d 85 (C.A. 5th).

IV

It was not error for the trial court to consolidate the indictments for trial. (R. 63.) Since the indictments were based upon the same series of transactions, they undoubtedly could have been included as separate counts in a single indictment, as provided by Rule 8(b) of the Federal Rules of Criminal Procedure for the District Courts of the United States. This having been so, the consolidation was permissible under Rule 13 of the Federal Rules of Criminal Procedure for the District Courts of the United States.

Where the defendants are charged with a substantive offense and with conspiracy and are tried without a jury, a refusal to grant separate trials is not error. *Long* v. *United States,* 160 F. 2d 706 (C.A. 10th). The joint character of the acts rendered a joint trial peculiarly appropriate. *Story* v. *United States,* 16 F. 2d 342 (C.A. D.C.), certiorari denied, 274 U. S. 739; *United States* v. *Interstate Properties,* 153 F. 2d 469 (C.A. D.C.); *Cataneo* v. *United States,* 167 F. 2d 820 (C.A. 4th). Petitioners complain that the consolidation resulted in the admission of statements and declarations made by the petitioners out of each other's presence. (Pet. 29.) This argument, however, ignores the fact that such statements and declarations were also admissible and binding upon the individual declarants with respect to the substantive offenses. In any case where a substantive charge and a con-

spiracy charge are consolidated for trial, such a result is likely to occur. This circumstance, however, does not provide a basis for ordering separate trials. *Hall* v. *United States,* 168 F. 2d 161 (C.A. D.C.), certiorari denied, 334 U. S. 853, rehearing denied, 335 U. S. 839. The trial court has wide discretion in a matter such as this. *Long* v. *United States, supra.*

CONCLUSION

The decision below affirming petitioners' conviction on the substantive counts is correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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November 1949.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 368, 369, 370

LOUIS H. ROSENBLUM,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

MAX STRYK,
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Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

SEPARATE AND SEVERAL PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

Nos. 368, 369, 370

LOUIS H. ROSENBLUM,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

MAX STRYK,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

JACOB WEISS,
Petitioner, Appellant Below,
vs.
UNITED STATES OF AMERICA,
Respondent, Appellee Below.

SEPARATE AND SEVERAL PETITION FOR REHEARING

Louis H. Rosenblum, Max Stryk and Jacob Weiss, each petitions for a rehearing upon his separate and several petition for a writ of certiorari, denial of which was made by this Court on December 5, 1949.

INTERVENING CIRCUMSTANCES

Since the preparation of said petitions for certiorari, the judgment of the United States Court of Appeals for the Seventh Circuit of June 13, 1949, which reversed the conviction of petitioners on the conspiracy indictment, has become final; the October 1948 term in which such judgment was rendered expired on October 2, 1949. (Rule 2, Title I, General Rules of the Court of Appeals for the Seventh Circuit.) The motion of the Government for rehearing was overruled by the Court of Appeals on August 24, 1949. No further application was made by either of the parties to reverse, or review such judgment.

Said judgment of the Court of Appeals now controls the rights of the parties herein; it has become the law of the case as to all matters therein properly decided, and such decision is now binding upon this Court.

Such judgment determines that:

(a) The substantive indictments, and the conspiracy indictments were tried below (R. 398), and all of the convictions on all of the charges (including those sought to be reviewed by this Court) rest, on the theory, finding and conclusion that the defendants were engaged in the same joint enterprise. (R. 399, 400.)

(b) Under the peculiar circumstances of these cases, the trial on the conspiracy charge embodied the same crime as that based on the substantive charges. (R. 399, 400.)

(c) The trial court failed to differentiate between the proof relative to the substantive offenses and that relative to the conspiracy charge. (R. 399-402.)

(d) The proceedings in the trial court, including the erroneous admission of testimony, were so preju-

dicial to the substantial rights of each petitioner that it was necessary to reverse the conspiracy conviction.

Having conclusively shown by the *final judgment* of the Court of Appeals that it was an abuse of judicial process to have returned the conspiracy charge, and that the trial court failed to differentiate between the proof relevant to the different charges (R. 398-402), petitioners very respectfully urge that they have shown by the record that they suffered substantial prejudice and in the trial there was a clear departure from the constitutional norm which guarantees them a fair and impartial trial.

The trial on different indictments for the same offense, at the same time, is shown by the record to have greatly aggravated the prejudicial effect upon their substantial rights; the legality of the conspiracy indictment was sustained upon the theory that it contained a sufficient charge of an offense separate from that charged in the substantive indictments (R. 401); the joint trial was had upon the theory that the statements of the different defendants which were admitted in evidence, and which were regarded as additional reasons for reversing the conspiracy charge, were admitted in the trial court, except as to the individual making such statements, against him solely and without prejudice to the others until and unless by proper evidence, a conspiracy is shown (R. 95); this resulted in getting incompetent prejudicial evidence in the record which the trial court could not and did not properly apply to the several charges. (R. 400-402.)

It was necessary to go to the Court of Appeals to find the true theory upon which the trials below were actually had, and its final judgment now establishes that petitioners were tried on the separate indictments (conspiracy and substantive) for one and the same offense:—that of having

engaged as participants in a joint enterprise designed to attempt to defeat and evade the payment of income taxes (R. 399, 400), as outlined in the conspiracy charge.

The conviction of conspiracy was reversed because, among other reasons, the trial court failed to differentiate between the proof relevant to the different charges. (R. 399.)

Petitioners thus bring into this Court a Record which goes one step further than Fiswick v. United States, 329 U. S. 211, where this Court was required to determine from the Record whether the error complained of wrongfully influenced the jury in arriving at its verdict.

In the instant cases no room for doubt exists; the final judgment of the Court of Appeals shows conclusively and determines judicially that the error was of such substance that it wrongfully influenced the trial court in arriving at its judgment. (R. 399.)

Nothing can be more vital or substantial in the enforcement of the criminal law than the right of the accused to be tried by a tribunal that can and does differentiate between the proof that is relevant to the respective charges made against him.

Nor is it fair and just that petitioners should be sent to the penitentiary for three years and each made to pay a fine of $10,000.00, plus court costs, upon a Record in which it is judicially established by the Court of Appeals—that the trier of their causes failed to distinguish between admissible and inadmissible evidence as to the proof relative to the crime charged against them.

In Kotteakos v. United States, 328 U. S. 750, where the record showed substantial prejudice, this Court said: "The inquiry cannot be merely whether there was enough

to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The true situation in our cases is that, as a result of the wrongful consolidation of the different indictments, the Record became so confusing to the trial court that it could not and did not give the petitioners a fair trial. No trial is fair where the trier of the facts fails to differentiate properly as to the proof applicable to the charges upon which the accused is being tried; the unfairness of the instant trial is now judicially established by the judgment of the Court of Appeals; it becomes more acute and of greater prejudice when the reviewing court reverses only as to a part of the unfair result, and affirms as to the other, though equally contaminated.

These causes were so intermingled that the reversal of one necessitated reversal of the other.

Gentry v. Billing, 73 F. (2d) 925 (9 C. A.).

The error is clearly one which relates to the substantial rights of petitioners, and is obviously so prejudicial as seriously to "affect the fairness, integrity and public reputation of judicial proceedings"; and under such situation the writ prayed for should be granted.

United States v. Atkinson, 297 U. S. 157;
McCandless et ux v. United States, 298 U. S. 342.

ADDRESS OF MR. CHIEF JUSTICE VINSON

For the purpose of urging this petition, petitioners regard the address of Mr. Chief Justice Vinson, before the American Bar Association on September 7, 1949, as an intervening circumstance of substantial and controlling effect; the context of which was not brought to their attention until they read the weekly advance sheet of the Supreme Court Reporter of November 15, 1949.

This address is certainly a succinct and essential clarification of Rule 38 of this Court, and of value to petitioners in the presentation of substantial grounds available to them for the granting of their writ, although not previously presented in their petition.

We understand therefrom that the Court is especially interested in the actual, practical effect of the disputed decision—its consequences for other litigants and in other situations, and that petitioners should show why it is vital that the questions involved be decided finally by this Court.

With this additional information as to the real purpose of a petition for certiorari, we will present substantial grounds for the granting of the writ, not previously presented in the petition.

AS TO QUESTION ONE

Congress has provided that the taxpayer shall file a return setting forth to such extent, and in such detail, as the Commissioner with the approval of the Secretary may by regulations prescribe, the items of gross income and the

deductions and credits allowed pursuant to the income tax Chapter. Section 51 (a) of the Internal Revenue Code (Title 26, United States Code). Treasury, Bureau of Internal Revenue, Regulations 111, Section 29.51-1-2-4 and 5 prescribe "Form 1040" as the Income Tax Return form, which further requires that "Gross Income" be broken down and made to include the items of:

"1. Salaries," "2. Dividends," "3. Interest on corporation bonds," "4. Interest on Government obligations," "5. Annuities," "6. Net gain (or loss) from sale or exchange of property," "7. Rents and Royalties," "8. Net profit (or loss) from business or profession," "9. Income (or loss) from partnerships; fiduciary income; and other income."

All of such information is deemed material and must be supplied by the taxpayer in his tax return.

It is just as vital and material to the taxpayer, when indicted, to know what item of his return is claimed to be false, as it is to the Treasury to know the items which make up the total of his gross income.

Petitioners assert that as a concomitant part of the taxing plan created by Congress, which requires the taxpayer to itemize and break down his gross income, it is just as vital and material that the Government be required, in a prosecution under Section 145 (b), to set out in the indictments the particular item or items listed in the return *as filed by the taxpayer* which are claimed to be false.

The indictment returned against each petitioner contains facts required by Congress in income tax cases where unlawful evasions under Section 145 (b), Title 26, United States Code, are involved, and no part of such indictments can be treated as surplusage.

This has been regarded as the law for many years, and *it has been the practice* of the Department of Justice, *in its indictments* for unlawful evasions, *to follow the form* of setting out the items contained in the break-down of the income as listed in the taxpayer's return, and then descriptively to set forth the particular item alleged to be false. See

Lange v. United States (1942), 161 F. (2d) 699 (7 C. A.);

Gleckman v. United States (1935), 80 F. (2d) 394 (8 C. A.), certiorari denied, 297 U. S. 709;

Lustig v. United States (1947), 163 F. (2d) 85 (2 C. A.), certiorari denied, 332 U. S. 775.

Sabourin v. United States (1946), 157 F. (2d) 820 (2 C. A.), certiorari denied, 329 U. S. 800;

Locke v. United States (1947), 166 F. (2d) 449 (5 C. A.), certiorari denied, 334 U. S. 837;

United States v. Chapman (1948), 168 F. (2d) 997 (7 C. A.);

Barcott v. United States (1948), 169 F. (2d) 929 (9 C. A.), certiorari denied Feb. 14, 1949, 60 S. Ct. 602;

Maxfield v. United States (1946), 152 F. (2d) 593 (9 C. A.), certiorari denied, 327 U. S. 794;

United States v. Berman, 75 F. Supp. 789 (D. C. N. D. Georgia);

Rose v. United States, 128 F. (2d) 622 (10 C. A.);

United States v. Farrington, 11 F. Supp. 215 (D. C. M. D. Penn.);

United States v. Yoffe, 52 F. Supp. 175 (D. C. D. Mass.);

Singer v. United States, 58 F. (2d) 74 (3 C. A.).

In our cases, where the item alleged to have been omitted was "Dividends," the trial court ordered a bill of par-

ticulars to show the names of the corporations from which such dividends had been received; See Barcott v. United States, 169 F. (2d) 929, where a similar motion was sustained as to "Dividends."

During the trial of our cases, the trial judge held that such break-down was material. (R. 89, 259, 261.) It was after the defendants had waived their right to a jury trial on the facts as to whether they had received "Dividends" as defined by the Statute (Sec. 115(a) Internal Revenue Code), and after they had rested their cases, on June 28, 1948 (R. 262), without introducing evidence on either of the "Dividend" or "Joint venture" theories, and nearly *eight weeks after the trial was closed* on August 18, 1948 (R. 274) that the trial judge *first intimated,* and decided, when rendering judgment, that he could not see how the defendants could be prejudiced by labeling the income as "dividends" or "profits of a joint venture" or merely "other income." (R. 297.)

The decision in our cases frustrates the intent of Congress to harmonize and to unify the procedure throughout the United States in tax evasion cases; it destroys the long established practice and policy of the Department of Justice in setting out in indictments for tax evasion the material and essential facts *broken down,* to comply with due process as required by the Constitution, for the information of the accused in cases of this character.

To permit the opinion in the instant cases to stand undecided by this Court, leaves this very material question open and means that some courts will hold that the allegations itemizing the break-down are surplusage, as the Seventh Circuit has done in our cases, and others may hold that such break-down is essential and material; See:

Singer v. United States, 58 F. (2d) 74 (3 C. A.);
Rose v. United States, 128 F. (2d) 622 (10 C. A.);

United States v. Molasky, 118 F. (2d) 128, 131 (7 C. A.);
United States v. Farrington, 11 F. Supp. 215 (D. C. M. D. Penn.);
United States v. Yoffe, 52 F. Supp. 175 (D. C. D. Mass.).

The decision of the Seventh Circuit in our cases seems to be in conflict with the reasoning of said decisions of the Third and Tenth Circuits, and certiorari should now be granted to settle this vital, national question.

But the instant cases present a far more important question, of greater and more far-reaching consequence, than the determination of whether such break-down is material and necessary. Here, the break-down was actually made by the Grand Jury in the indictments, and it served to beguile and deceive the defendants; they relied on such allegations as being essential and material; they were encouraged by the trial court to believe that such allegations were material (R. 89, 259, 261); the Department of Justice believed such allegations to be material.

Consequently, defendants now very insistently challenge the right and the fairness of the Department of Justice in adopting this universal practice of alleging such break-down in the indictments, and, then, after conviction on a theory not outlined in the indictments, contend that such break-down was surplusage. In this situation, defendants deny the constitutional power of the lower courts to decide that such allegations were surplusage. The highest essence in the concept of due process is involved in and is violated by such illegal procedure.

Section 145(b), Internal Revenue Code, is violative of the Sixth Amendment to the Constitution if the taxpayer can be specifically charged with having omitted a speci-

fied amount of "Dividends" from his return, and then be convicted of having had receipts from a joint venture which were omitted from his return, but which was not charged in the indictment.

The language of Section 145 (b) is very broad, and provides severe punishment for a tax evasion "in any manner"; but the generality of this language *does not justify a violation of the Sixth Amendment;* it emphasizes the absolute necessity of requiring indictments to set out the specific manner in which the offense was committed, including the break-down of the particular items involved.

Our cases fully demonstrate the imminent danger to an accused of allowing an abandonment of this practice; petitioners were charged with omitting "Dividends" from their returns. By denying the writs, and thus giving tacit approval to the decision of the Seventh Circuit, that such allegation is surplusage, the door is wide open for grave injustice to taxpayers charged with evasion, for, under such charge, the accused can hereafter be convicted of having omitted "Salaries," "Interest," "Annuities," "Net Gains from sale or exchange of property," "Rents and Royalties," "Net profit from business or profession," "Income from partnerships, or other income" or any one or more thereof. Such result would be a palpable violation of the Sixth Amendment. If Section 145 (b) is susceptible to an interpretation which will permit any such result, then it is unconstitutional and void.

The indirect method, finally adopted by the prosecution in our cases below, and approved by the Court of Appeals, of treating the indictments in effect as though the substance thereof had been altered, although not physically changed, by disregarding as surplusage averments which had been placed therein by the Grand Jury following the practice of the Department of Justice in its effort to stand-

ardize what it believed to be essential and material averments in indictments of this character, is in clear violation of the constitutional rights of petitioners, and all others accused of crimes of this character, and is in conflict with the applicable decision of this Court in Ex Parte Bain, 121 U. S. 1, and contrary to the decisions of other circuits.

Edgerton v. United States, 143 F. (2d) 697 (9 C. A.);
Dodge v. United States, 258 F. 300, 305 (2 C. A.);
Butler v. United States, 20 F. (2d) 570 (8 C. A.);
Rule 7 (c) Federal Rules of Criminal Procedure.

To prevent grave injustice, not only to petitioners, but to all others accused of tax evasion, necessity requires the consideration and judicial determination by this Court of petitioners' questions in order to obtain uniformity of the judgments in the lower courts. The decision of the Seventh Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such departure by the lower court, upon this matter of national importance in all tax evasion prosecutions, as to call for the exercise of this Court's power of supervision.

AS TO QUESTION TWO

Petitioner's request for a rehearing upon this question is limited to their contention that the proof of the receipt of "gross income" in commercial transactions does not make a prima facie showing of violation of Section 145 (b) of the Internal Revenue Code, and does not shift the burden to the defendants of proving their cost and expenses in such transactions. The cases were tried, and the convictions affirmed, upon the erroneous theory that they should have proved their innocence after the government introduced evidence showing gross receipts.

The practical effect of disputing this part of the decision below is to get a decision of this Court which will make

uniform all decisions in prosecutions for tax evasions where it is claimed by the accused that the burden rests upon the Government to show, beyond a reasonable doubt, that he actually had a net income upon which he owed a tax that he did not pay, and where he contends that proof of gross income from mercantile transactions does not make a prima facie showing of a violation of Section 145 (b).

Petitioners especially dispute that part of the decision below that,

> "Any possible prejudice to the defendants is seen to be even more remote if we consider the fact that defendants' principal defense is that the money received was merely gross income from which they should be allowed to deduct expenses which exceeded the income. If defendants were relying on the Government's original theory of joint venture, as they now claim they were, *why did not they attempt to rebut the government's case by introducing evidence of the expenses which they assert were incurred in the sale of the whiskey? Such evidence would have been admissible under the joint venture theory, but not under the dividend theory.* Yet they rested their case without introducing any evidence." (R. 279.) (Emphasis supplied.)

Where it is shown that gross income was received in a joint venture, and such gross income was derived from buying and selling an article of merchandise where costs and expenses in dealing therein are also clearly proven, the Government must go further and show either that such costs and expenses did not exist, or, that they were less than the gross receipts. Especially is this true where, as in this case, defendants had furnished detailed information to the government as to such costs and expenses more than two years before the trial was had. Supplying such

facts to the government so far in advance of the trial disproved felonious and wilful intent; it created a presumption of innocence, and the Government could not secure conviction without proving beyond reasonable doubt that such cost and expenses were not had, or that there was no reasonable excuse for claiming these. See:

Gleckman v. United States, 80 F. (2d) 394, 395-399;
Bryan v. United States, 175 F. (2d) 223;
Jones v. United States, 164 F. (2d) 398, 400 (5 C. A.);
Young v. United States, 97 F. (2d) 200 (5 C. A.).

This is a rule of law which affects the trial of all income tax evasion cases.

Defendants contend that the true rule which should determine their rights, and the rights of all others tried for tax evasion, is the one adopted by the Seventh Circuit in United States v. Fenwick, No. 9895, decided since our petition was filed, on November 4, 1949, not yet reported, but a copy of such opinion being the Appendix to defendant's reply brief heretofore filed; in the Fenwick decision, which is an income tax case, the court holds that the government has the burden of proof; that the burden *never* shifts to the defendant; that circumstantial evidence must be of such character as to exclude every reasonable hypothesis except that of guilt; the defendant is not compelled to take the stand; he is not compelled to make proof that he is innocent; he must be proved guilty beyond all reasonable doubt. In that case, the question was whether all of the assets of the defendant had been included in the government's computation of net worth, and the court said that where there is uncertainty on that question, such computation could not be relied upon, and that essential proof of no other assets was the corner-stone of the government's evidence. See, also,

Bryan v. United States (5 C. A.), 175 F. (2d) 223, certiorari granted, No. 178, October term, 1949.

The burden does not rest upon defendants to supply any evidence upon any of these matters.

Jones v. United States, 164 F. (2d) 398 (5 C. A.).

If uniformity in decisions of this character is to be achieved, this Court should grant the writs prayed for by petitioners and decide, where the evidence is circumstantial, whether a conviction of fraudulently attempting to evade the payment of an income tax can rest upon evidence which shows the receipt of gross income from dealing in an article of merchandise, where costs and expenses are shown to have resulted from such dealing, without the government proving that either such costs and expenses did not exist, or they were less than the gross receipts, or there was no reasonable excuse for claiming costs and expenses.

AS TO QUESTION THREE

Petitioners present to this Court the final judgment of the Seventh Circuit which decides that, "under the peculiar circumstances of the case," the Judgment of conviction on the conspiracy charge must be reversed because "it embodies the same crime as that based on the substantive charges," and other reasons stated. (R. 399, 400, 401, 402.)

We do not here have the question as to whether the commission of the substantive offense, and a conspiracy to commit such offense, are separate and distinct offenses within the rule that a conviction for conspiracy to commit the one will not bar a conviction of the other, as in Pinkerton v. United States, 328 U. S. 640. Such question was eliminated by the final decision of the Seventh Circuit that under the peculiar circumstances in *our cases both charges embodied the same crime.*

The Court of Appeals adjudged that the trial court in the instant cases failed to differentiate between the proof relative to the substantive charge and the conspiracy charge. Yet it was the *same* inadmissible proof *in all cases.* The Court of Appeals reversed only as to the conspiracy charge.

The cases of Kotteakos v. United States, 328 U. S. 750, and Fiswick v. United States, 329 U. S. 211, are decisive of our question here and there should be a reversal.

There can be no doubt remaining after reading the Memorandum Opinion of the trial court (R. 275-282) that in large part he premised his determination of guilt in all of the cases, upon the very proof which caused the Court of Appeals to reverse the conspiracy charge and which got into the Record because, as Circuit Judge Duffy said (R. 401), the trial court could not "entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge" on a consolidated trial.

On the decision of this Court in the case of Krulewitch v. United States, 336 U. S. 440, accentuated by the concurring opinion of Mr. Justice Jackson, the writ prayed for herein should be granted. Otherwise, the condemned unlawful practice which "is an abuse of the judicial process" (R. 400), will continue, notwithstanding that such procedure often constitutes a serious threat to a fair administration of justice.

Krulewitch v. United States, 336 U. S. 440, 445, 446.

Such prejudicial error being so shown by the final judgment of the Seventh Circuit as to the conspiracy charge, it necessarily follows that error contaminated the trial and confused the court as to the substantive charges. Peti-

tioners contend that this question requires consideration by this Court as it is very important in the administration of criminal law.

AS TO QUESTION FOUR

The final judgment of the Seventh Circuit reversing the conviction on the conspiracy charge partially because it embodied the same crime as that upon which the substantive charges were based, establishes the fact that prejudicial error occurred in the trial against the petitioners; such error could not have occurred except for the reason that said causes were wrongfully consolidated for trial, over petitioners' objections (R. 63) and in contravention of Rules 8 and 13 of the Federal Rules of Criminal Procedure.

Petitioners respectfully urge that the consolidation of their causes resulted in a gross miscarriage of justice as to them, and the decision which is disputed in this regard is not only violative of their constitutional and legal rights, but it is a question involving a principle of tremendous importance to other litigants in the administration of federal criminal law and procedure.

That such conclusion must follow, is clearly evidenced by the reasoning of Circuit Judge Duffy (R. 401) wherein he says:

> "Courts have protested vigorously against the current and perhaps growing habit to indict for conspiracy in addition to the substantive offense, and have pointed out that such procedure often constitutes a serious threat to a fair administration of justice. Krulewitch v. United States, 336 U. S. 440, 445-446. As far back as 1925, the Conference of Senior Circuit Judges pointed out the dangers of such practice. And any judge with trial court experience knows that the

> charge of conspiracy in an indictment is often used at the trial for the purpose of getting evidence into the record which would otherwise be inadmissible, and that the trial judge is often powerless to prevent such abuse. As was stated in the Krulewitch case, supra (p. 453), 'But the order of proof of so sprawling a charge is difficult for a judge to control'; * * *but he cannot entirely avoid the evil of opening the door at the trial for evidence inadmissible except for the conspiracy charge.*" (Emphasis supplied).

Judge Duffy was so strongly convinced of the prejudicial effect resulting to the defendants from the consolidation of the two charges which were made against them, that he also said:

> "This is the kind of a case, in my opinion, where it is an abuse of judicial process to charge conspiracy when practically the same offense has been charged in the substantive counts." (R. 400.)

Chief Judge Major said:

> "I think the judgment premised on conspiracy should be reversed because under the peculiar circumstances of the case it embodies the same crime as that based on the substantive charges. A more conclusive reason for reversal, however, arises from the failure of the Court to differentiate between the proof relevant to the substantive offense and that relative to the conspiracy charge." (R. 399.)

Petitioners very earnestly urge that the final judgment of the Court of Appeals reversing the conspiracy charge is conclusive that prejudicial error was committed against petitioners because of the wrongful consolidation of said causes.

The opinions of Chief Judge Major and Circuit Judge Duffy (R. 398-402) present strong, vigorous, judicial rea-

sons why this Court should grant the writs prayed for herein, and clearly show that substantial prejudice has resulted to the defendants by the proceedings below, and they likewise show that this question involves a very important principle of criminal law which it is vital for this Court now to decide.

CONCLUSION

This Court cannot say that the judgments in these cases were not substantially swayed by the prejudicial errors which we have pointed out and it is impossible to conclude that the substantial rights of defendants were not affected or that justice has been done by reversing part of the convictions, merely.

Petitioners urge that their petition presents tremendously important principles, and involves the decision of questions whose resolution will have immediate importance far beyond the particular facts and parties affected, especially in income tax evasion cases.

Prejudicial error being now judicially established, petitioners respectfully request this Court to reconsider its order of December 5, 1949, denying certiorari herein.

It cannot be said that petitioners have been justly tried and fairly convicted of any of the charges for which they were tried where it is adjudicated that their conviction is tainted with judicial inability to differentiate as to the evidence applicable to the charges against them; the same errors are bound to affect many others unless this Court shall intervene and decide the questions which are presented; uniformity of decisions will only be established by the decision of this Court on these questions.

It is respectfully urged that the order denying certiorari be set aside and that certiorari be granted as prayed for in the petition.

Dated this 19th day of December, 1949.

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CERTIFICATE OF COUNSEL

We, Albert Ward, Palmer K. Ward and William B. Harrell, counsel for petitioners, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and that said Petition is restricted to grounds which are confined to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented, as required by Rule 33 (2) of the Rules of the United States Supreme Court.

Dated this 19th day of December, 1949.

ALBERT WARD,

PALMER K. WARD,

WILLIAM B. HARRELL,
Counsel for Petitioners.